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The Deconstitutionalization of the Confrontation Clause: A Proposal for a Prosecutorial Restraint Model

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Ironically, even as America is celebrating the bicentennial of the Bill of Rights, the Supreme Court is continuing with its dismemberment of the grand design of the Sixth Amendment.[1] The Court has already greatly reduced the constitutional value of one of the amendment's clauses—the right to confrontation. It has transformed a constitutional guarantee into an evidentiary doctrine "generally designed to protect similar values" as the hearsay rule.[2] Even though the Court maintains that "the

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1. The Sixth Amendment provides:

> In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

2. Idaho v. Wright, 110 S. Ct. 3139, 3146 (1990). The statement was originally made in California v. Green, 399 U.S. 149, 155 (1969), but in that case the Court went on to explore the Clause's historical origins including the Sir Walter Raleigh trial. *Id.* at 156-58. For discussion of that trial, see *infra* text accompanying notes 58-59; *see also* Edward J. Imwinkelried, *The Constitutionalization of Hearsay: The Extent to Which the Fifth and Sixth Amendments Permit or Require the Liberalization of the Hearsay Rules*, 76 MINN. L. REV. 521, 525 (1992). Professor Imwinkelried writes:

> Having equated confrontation with the right to cross-examination and defined the right instrumentally, the next step in the Court's evolution of confrontation doctrine was predictable: It concluded that the prosecution may substitute a showing of the accuracy or reliability of

overlap [between the hearsay rule and the Confrontation Clause] is not complete,"[3] the only function the Court currently ascribes to the Clause is the promotion of accuracy in fact-finding,[4] a goal which is the primary objective of evidentiary rules.[5]

In 1992, the Court expanded the area of constitutional and evidentiary congruence. In *White v. Illinois*,[6] seven members of the Court held that all hearsay admitted pursuant to a firmly rooted hearsay exception automatically satisfies the Confrontation Clause.[7] Consequently, when a statement satisfies a firmly-rooted exception, the court need not examine the context in which the statement was made nor consider the availability of the declarant.[8] Furthermore, the Court has previously

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the declarant's hearsay statements for the right to cross-examine the declarant at trial.

Id. at 525.

3. United States v. Inadi, 475 U.S. 387, 393 n.5 (1986).

4. Idaho v. Wright, 110 S. Ct. at 3151-52 (" '[A] *per se* rule of exclusion would . . . frustrate the *truth-seeking purpose* of the Confrontation Clause.' " (quoting Dutton v. Evans, 400 U.S. 74, 95 (1970) (Harlan, J., concurring) (emphasis added))). The Court had previously insisted on this interpretation of the function of confrontation. *See, e.g.*, Tennessee v. Street, 471 U.S. 409, 415 (1985) ("[T]he Confrontation Clause's very mission [is] to advance 'the accuracy of the truth-determining process in criminal trials.' " (quoting Dutton v. Evans, 400 U.S. at 89); *see also* White v. Illinois, 112 S. Ct. 736, 743 (1992) ("the Confrontation Clause has as a basic purpose the promotion of the 'integrity of the factfinding process.' " (quoting Kentucky v. Stincer, 482 U.S. 730, 736 (1986)).

5. *See* FED. R. EVID. 102. Rule 102 provides: "These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." *Id.*

6. 112 S. Ct. 736 (1992). The Court unanimously agreed that the Confrontation Clause was not violated by the admission of hearsay statements made by a four-year-old child who was never produced by the prosecution nor shown to be unavailable. *Id.* at 744. The statements were made by the child to her baby-sitter, mother, a police officer, an emergency room nurse, and a physician. *Id.* at 739.

7. The Court explained: "where proffered hearsay has sufficient guarantees of reliability to come within a firmly rooted exception to the hearsay rule, the Confrontation Clause is satisfied." *Id.* at 743. Justices Thomas and Scalia, concurring, would have held that the kind of statements at issue in *White* were not subject to the Confrontation Clause as they were not "formalized testimonial materials" obtained by the prosecution. *Id.* at 747 (Thomas, J., concurrring, joined by Scalia, J.); *see also infra* notes 25-30 and accompanying text (discussing Thomas's concurrence).

8. In *White*, the statements had been admitted under Illinois' hearsay exceptions for spontaneous declarations and statements made in the course of receiving medical care. *White*, 112 S. Ct. at 740. The majority treated all the statements uniformly for purposes of Confrontation Clause analysis; it did not

indicated that even a statement admitted pursuant to a non-firmly rooted hearsay exception will pass constitutional muster if it possesses sufficient indicia of reliability.[9] Whether the Court will insist on the declarant's unavailability in such a case is not yet known,[10] but it is clear that the Court views the ascertainment of the truth as the unique concern of both the hearsay rule and the Confrontation Clause.

This insistence that the sole function of the Confrontation Clause is to promote more accurate fact-finding ignores the historical background against which the Clause was drafted and overlooks the context in which it is placed. The majority of the Court has forgotten, at least on a conscious level,[11] that the Confrontation Clause is a provision in the Sixth Amendment, that the Sixth Amendment is a part of the Bill of Rights, and that the Bill of Rights is part of the Constitution of the United States. While in the recent *White* case, Justices Thomas and Scalia, concurring, exhibited far more historical consciousness than their colleagues, their analysis suffers from other infirmi-

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differentiate on the basis of the person to whom the statement was made, and it did not explore the context in which the various statements were solicited. *See id.* at 741-43.

9. *See* Idaho v. Wright, 110 S. Ct. 3139 (1990). In *Wright*, the defendant was convicted of lewd conduct with a minor after a jury found that the defendant held her two-year-old and five-year-old daughters down to permit a co-defendant to have sexual intercourse with them. State v. Wright, 775 P.2d 1224, 1224-25 (Idaho 1989), *aff'd sub nom.* Idaho v. Wright, 110 S. Ct. 3139 (1990). Although the trial court ruled that the two-year-old girl was incompetent to testify before a jury, under Idaho's residual hearsay exception the court nonetheless admitted the girl's statements to a pediatrician concerning instances of sexual abuse. *Id.* at 1225. The Idaho Supreme Court reversed the conviction, holding that the doctor's testimony violated the defendant's rights under the Confrontation Clause. *Id.* at 1231. The United States Supreme Court affirmed. The majority and dissent agreed that trustworthiness was the touchstone of admissibility but disagreed in their assessments of the constitutional trustworthiness of the statement and on the factors that may be relied upon in evaluating reliability. *Compare* 110 S. Ct. at 3150 (majority opinion) (concluding that evidence corroborating the truth of a hearsay statement does not support "a finding that the statement bears particularized guarantees of trustworthiness") *with* 110 S. Ct. at 3153 (Kennedy, J., dissenting) (concluding that "one of the best ways to determine whether what someone says is trustworthy is to see if it is corroborated by other evidence").

10. In *Wright*, the majority "assume[d] without deciding that, to the extent the unavailability requirement applies in this case, the younger daughter was an unavailable witness within the meaning of the Confrontation Clause." 110 S. Ct. at 3147; *see also* Imwinkelried, *supra* note 2, at 531-36 (discussing the unavailability issue to date).

11. The cases illustrate, however, that the Court may at times be sensitive on a less conscious level to constitutional concerns underlying the Confrontation Clause. *See infra* notes 179, 180, 192-94 and accompanying text.

ties discussed below.[12]

This Article argues that the Court's evidentiary approach ignores a supporting role for the Confrontation Clause in restraining the capricious use of governmental power. This Article assumes that one of the central concerns of the Bill of Rights was to "guard . . . society against the oppression of its rulers."[13] As ably documented in a recent article, the Bill of Rights can be read holistically as aiming to keep government agents under control through provisions enhancing the monitoring and deterrence of governmental abuse, and ensuring the ability of ordinary citizens to participate in this process.[14]

The Bill of Rights has not customarily been construed in a unitary manner in which the meaning of the specific clauses is illuminated by the aims and policies underlying the document as a whole.[15] Instead, perhaps as a consequence of the parcelling out of constitutional issues among separate law school courses, the particular guarantees of the amendments have been studied in a fragmented manner that obscures the grand design of the Bill of Rights and its relationship to the Constitution,[16] and is at odds with ordinary canons of statutory analysis.[17] Moreover, by focusing on the parts more than on the

12. *See infra* notes 25-30.

13. THE FEDERALIST No. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961), *quoted in* Akhil R. Amar, *The Bill of Rights as a Constitution*, 100 YALE L.J. 1131, 1132-33 (1991) (supporting Professor Amar's thesis that this latter concern, "protection of the people against self-interested government" was the central concern "in the minds of those who framed the Bill of Rights").

14. Amar, *supra* note 13, at 1132-33. While Professor Amar views the jury trial provisions of the Sixth Amendment as furthering this holistic goal, he does not look at the other provisions in the amendment in the same way. He characterizes "speedy trial, assistance of counsel, confrontation, and compulsory process" as "nonstructural benefits." *Id.* at 1197-98. This Article demonstrates that his thesis is consistent with the other provisions of the Sixth Amendment as well.

15. *Id.* at 1132 ("[N]o legal academic in the twentieth century has attempted to write in any comprehensive way about the Bill of Rights as a whole.").

16. *See* Howard W. Gutman, *Academic Determinism: The Division of the Bill of Rights*, 54 S. CAL. L. REV. 295, 376 (1981). Gutman concludes that the typically divided study of the Constitution splits the Gestalt describing relations between the state and its citizens. That split has the effect of restructuring basic concepts of liberty embodied in the document as a whole. *Id.*

17. *See* 2a NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46.05, at 103 (C. Dallas Sands, 5th ed., 1992) [hereinafter SUTHERLAND]. *Sutherland* explains:

> A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or

whole, we have lost sight of the Bill of Rights as a *political* document with a principal objective of restraining the power of the government vis-a-vis the individual.

In a criminal trial, the government's might gives an enormous advantage to the prosecution, an advantage that many of the provisions of the Bill of Rights are designed to keep in check.[18] Allowing the government to use evidence obtained through private interviews markedly enhances the potential for abuse. The prosecution has the incentive and the power to shape the witness's answers in accordance with its theory of the case.

The opportunity to cross-examine the government agent to whom the out-of-court statement was made does not provide adequate protection. The agent will often be both a professional investigator with experience in obtaining statements and a professional witness adept at preserving the secrecy of the government's operations. The government should not be permitted to hide behind the cloak of the hearsay rule and the Confrontation Clause. Furthermore, the creation of evidence in secret hinders the jury from scrutinizing a process in which jurors should play a role as political participants. The means used by the government to prosecute crime is a matter of public concern.[19]

Hearsay statements procured by agents of the prosecution or police should therefore stand on a different footing than hearsay created without governmental intrusion.[20] The Confrontation Clause should bar hearsay statements elicited by

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section so as to produce a harmonious whole. Thus, it is not proper to confine interpretation to the one section to be construed.

Id.; *see also* Philbrook v. Glodgett, 421 U.S. 707, 713 (1975) (quoting United States v. Heirs of Boisdorè, 49 U.S. (8 How.) 113, 122 (1850) ("In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.")).

18. Wardius v. Oregon, 412 U.S. 470, 480 (1973) (Douglas, J., concurring) ("Much of the Bill of Rights is designed to redress the advantage that inheres in a government prosecution.").

19. *See* Amar, *supra* note 13, at 1187-89 (discussing the jury's role in acquiring information about the affairs of government).

20. *See* Roger W. Kirst, *The Procedural Dimensions of Confrontation Doctrine*, 66 NEB. L. REV. 485, 487 (1987) (suggesting that the Confrontation Clause is "a limit on the procedure the government [can] use" to prosecute and does not relate solely to the reliability of the contents of the statement); *cf.* FED. R. EVID. 803(b) & (c) (omitting from public record hearsay exception matters observed by law enforcement personnel and factual findings resulting from investigations authorized by law when offered against defendants in criminal cases).

governmental agents unless the declarant is produced at trial or unless special procedures discussed below are followed.[21] This interpretation is consistent with other Sixth Amendment jurisprudence and would enable the Confrontation Clause to operate as an integral part of the Sixth Amendment scheme that enables the public to scrutinize the process by which the government obtains and uses evidence in a criminal trial. It would complement the other rights that the amendment grants—trial by jury, a public trial, specification of the charges, and right to counsel—by providing yet another mechanism for making crucial workings of the government visible and keeping the overwhelming prosecutorial powers of the government in check.

I do not claim that I can prove that the drafters of the Bill of Rights intended such an interpretation of the Confrontation Clause. Little information exists about precisely what the concept of confrontation signified in the seventeenth and eighteenth centuries in England and the colonies.[22] Nor is an intentionalist approach advocated even if the historical record were considerably more clear.[23] This Article suggests, however, that an interpretation of the Confrontation Clause as part of a mechanism for controlling the central government is historically plausible, is consistent with a unitary view of the Bill of Rights, and is compatible with the results of the Court's Sixth Amendment jurisprudence, even if not always in accord with what the Court has said. Most important, viewing the right to confrontation as part of a package of rights concerned with protecting the people against governmental oppression promotes significant values and restores a valuable purpose to the clause.[24] In criminal prosecutions, the ability of the accused and the public to monitor, curb, and expose prosecutorial abuse

21. See discussion *infra* part III.

22. *See, e.g.*, Murl A. Larkin, *The Right of Confrontation: What Next?*, 1 TEX. TECH L. REV. 67, 67 (1969) ("Oddly, . . . the right of an accused 'to be confronted by the witnesses against him' is seldom mentioned in early historical documents. The precise source of this use of the word 'confront' is obscure."); *see also* California v. Green, 399 U.S. 149, 173-74 (1970) (Harlan, J., concurring) ("[T]he confrontation clause comes to us on faded parchment.").

23. *See* Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349, 351-57 (1989). In addition to providing useful references to the literature on original intention, *id.* at 349, Professor Finkelman makes a compelling argument for why it may be impossible to determine the original intent of the framers with regard to provisions about which there exists far more contemporary history than exists concerning the Confrontation Clause. *Id.*

24. *See* discussion *infra* part III.A.

remains of utmost importance, despite the passage of two hundred years since the adoption of the Bill of Rights.

Justice Thomas's and Scalia's reading of history in *White v. Illinois*[25] resembles the approach taken in this Article in some respects. Responding to a suggestion contained in the amicus brief filed by the United States, Justice Thomas's concurring opinion endorses an interpretation of the phrase "witness against [the defendant]" that would limit the scope of the Confrontation Clause to certain types of "testimonial materials that [were] historically abused by prosecutors."[26] According to Justice Thomas, such an approach would be "faithful to both the provision's text and history."[27]

The acknowledgment of English history's role in shaping the right to confrontation and the recognition of restraint of the prosecution as a core purpose of the doctrine are in accord with this Article's approach. But the concurring opinion differs from the proposals here advocated in a number of significant respects.

In the first place, although this Article agrees that statements elicited by the government require special treatment, this conclusion does not require exempting all other hearsay from Confrontation Clause analysis as Justice Thomas contends.[28] The proposals advocated in this Article are responsive to the Bill of Rights' concern with restraining the might of the government; other objectives of the Bill of Rights and the Sixth Amendment support restrictions on hearsay even though the government played no role in its creation.[29]

Second, Justice Thomas's opinion takes a formalistic rather than a functional approach to the kind of prosecutorially ob-

25. 112 S. Ct. 736, 744-48 (1992) (Thomas, J., concurrring, joined by Scalia, J.).

26. *Id.* at 744.

27. *Id.* The opinion briefly reviews some English history and alludes to the trial of Sir Walter Raleigh. *Id.* at 745. It also argues that "[a]s a matter of plain language . . . it is difficult to see how or why the Clause should apply to hearsay evidence as a general proposition." *Id.* at 746.

28. *Id.* ("The standards that the Court has developed to implement its assumption that the Confrontation Clause limits admission of hearsay evidence have no basis in the text of the Sixth Amendment."). The majority in *White* explicitly rejected Justice Thomas's narrow reading of the Confrontation Clause on the ground that the Government's argument "comes too late in the day" in light of the Court's many decisions equating the hearsay rules and the Confrontation Clause. *Id.* at 741.

29. *See* Randolph N. Jonakait, *The Right to Confrontation: Not A Mere Restraint on Government*, 76 MINN. L. REV. 615, 615 (1992).

tained statements that would be covered. Instead of focusing on the circumstances in which the statement was obtained, as this Article does, the concurring opinion in *White* would draw distinctions based on the form in which the statement was memorialized, limiting the protection of the Clause to statements "contained in formalized testimonial materials."[30] This approach exalts the sixteenth and seventeenth century format in which inquisitionally obtained statements were recorded, over the dangers posed by modern methods of prosecutorial questioning.

Third, this Article suggests that a more stringent test than presently mandated should be required when the prosecution seeks to introduce extrajudicial statements that it has elicited. Although the concurring opinion does not explicitly discuss this issue, certainly its thrust is to whittle away at the right to confrontation by greatly limiting the ambit of the doctrine. In that sense, this Article and the opinion have little in common. Rather than seeking to curtail the operation of the Clause, I believe that we must apply it more vigorously if we are to achieve the Bill of Rights' objective of protecting individuals against governmental overreaching.

Two kinds of cases in which hearsay statements often play a prominent role demonstrate the need for a stringent prosecutorial restraint model. These cases involve prosecutions for child sexual abuse and for drug offenses. In the past few years, the United States has experienced an epidemic of child sexual abuse prosecutions. Many of these cases have received extensive media attention. Especially as regards allegations of sexual abuse in schools and day care centers, the ensuing public outcry has led to enormous political pressures on prosecutors to secure convictions. In several recent notorious cases, the prosecutorial response has been likened to the over-zealousness encountered in the Salem Witch trials.[31] Observers claim that

30. This formulation is considerably narrower than the Government's proposal. The Government in its amicus brief had argued that the Confrontation Clause should apply only to statements made to prosecutors in contemplation of legal proceedings. *White*, 112 S. Ct. at 747 (Thomas, J., concurring). Justice Thomas responded by stating that "[a]ttempts to draw a line between statements made in contemplation of legal proceedings and those not so made would entangle the courts in a multitude of difficulties." *Id.* Instead he suggested the following formulation: "the Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions." *Id.*

31. *See, e.g.*, RICHARD WEXLER, WOUNDED INNOCENTS 300-02 (1990); Alex-

prosecutors or their agents cajoled, coaxed, and threatened children during interviews, often with special techniques that possess a high potential for improper suggestion.[32] Furthermore, the prosecution's experts often have publicly funded jobs and rely on studies financed by government research grants.[33] Thus they are dependent on the epidemic's continuance.[34]

If prosecutors succumb to political pressures when inter-

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ander Cockburn, *Out of the Mouth of Babes: Child Abuse and the Abuse of Adults*, 250 THE NATION 190, 191 (1990).

32. Commentators have decried the tactics of prosecutors and investigators in several recent notorious cases. In the McMartin case, in which the teachers at a nursery school were charged with sexual abuse, the jurors who acquitted the defendants of 52 counts of molestation criticized investigators' interviewing procedures. Robert Reinhold, *2 Acquitted of Child Molestation in Nation's Longest Criminal Trial*, N.Y. TIMES, Jan. 19, 1990, at A1. Jurors stated that the interviewers' leading questions prevented the jury from hearing the children's story in their own words. Seth Mydans, *For Jurors, Facts Could not be Sifted from Fantasies*, N.Y. TIMES, Jan. 19, 1990, at A18. According to the jurors, who were shown videotaped interviews of the children, the investigators used leading questions and "pressure bordering on coercion to confirm the stories of other children." Seth Mydans, *Child Abuse: Some Prosecutors Win*, N.Y. TIMES, Jan. 20, 1990, at A12; *see also* PAUL EBERLE & SHIRLEY EBERLE, THE POLITICS OF CHILD ABUSE 17-91 (1986) (discussing and reprinting portions of the McMartin preliminary hearing); Cathleen Decker, *McMartin Case Puts Reiner in Political Hotseat*, L.A. TIMES, Feb. 1, 1990, at A29 (suggesting that politics played a pivotal role in the district attorney's decision to retry the defendants on the remaining thirteen counts). In another notorious case in Bakersfield, California, the state attorney general's office conducted an investigation after several defendants had been convicted of child molestation and were serving multiple life sentences. The investigation revealed that children were over-interviewed and pressured into making statements which later proved to be false. Jay Mathews, *In California, a Question of Abuse; An Excess of Child Molestation Cases Brings Kern County's Investigative Methods Under Fire*, WASH. POST, May 31, 1989, at D1, D2. Children reported that investigators threatened to take them away from their families until they told the "truth." *Id.* at D2-D3; *see* Eric Malnic, *Bakersfield Torn By Horror Stories of Child Molesting; Cult Killings, Cannibalism Reported; Lack of Evidence Hints at Witch Hunt*, L.A. TIMES, Aug. 4, 1985, at A3. In yet another case, a Minnesota prosecutor was publicly rebuked for mishandling an investigation in which charges of sexual abuse against 21 of the 24 defendants were dropped and two other defendants were acquitted. E.R. Shipp, *Prosecutor in Sex Case to Stay in Office*, N.Y. TIMES, Oct. 11, 1985, at A16.

33. *Cf.* David C. Raskin & John C. Yuille, *Problems in Evaluating Interviews of Children in Sexual Abuse Cases*, *in* PERSPECTIVES ON CHILDREN'S TESTIMONY 184, 186-87 (S.J. Ceci et al. eds., 1956) (noting that it is "common practice" for case worker interviewers to assume that allegations of sexual abuse are true).

34. *See* Josephine A. Bulkley, *The Impact of New Child Witness Research on Sexual Abuse Prosecutions*, *in* PERSPECTIVES ON CHILDREN'S TESTIMONY, *supra* note 33, at 208, 213 n.24. Bulkley notes that two of the most recent studies have been funded by grants from the Office of Juvenile Justice and Delinquency Prevention and from the National Institute of Justice. *Id.*

viewing potential child witnesses in sexual abuse prosecutions, the jury, as the public's representative, needs as much information as possible. An institutional bias that skews the prosecutorial process needs to be exposed. Consequently, in these kinds of cases the Confrontation Clause should be interpreted to restrain prosecutors from using suggestive, manipulative questioning techniques. Even if the interviewed child is subsequently produced as a declarant, the jury may be unable to ascertain to what extent the interrogation has tainted the child's initial perception and memory.[35] Hence, in the case of children, prophylactic measures discussed below are needed to make Confrontation Clause protection meaningful.[36]

The war on drugs certainly is politically inspired by the government's perception of what the public wants. As with child sexual abuse cases, prosecutors are under tremendous pressure to get results. In addition, drugs are related to the government on another level. They are intertwined with our international affairs, as in the cases of Manuel Noriega and Oliver North, and with our financial institutions in elaborate money laundering schemes.[37] Public exploration of the underlying relationships is hampered by the Supreme Court's treatment of the co-conspirator's exception, which immunizes all declarants from production at trial,[38] even when their statements were elicited by a federal agent or an informant.[39] The jury and the public need to know about the government's role in creating this evidence. The assumption that all drug defendants deserve what they get should not blind us to the need to

35. *Cf.* United States v. Spotted War Bonnet, 933 F.2d 1471 (8th Cir.), *cert. denied*, 60 U.S.L.W. 3577 (1992). The majority in *Spotted War Bonnet* affirmed a conviction in a child sex abuse case because the hearsay declarants, the alleged child victims, actually testified. *Id.* at 1473. The dissent by Chief Judge Lay stressed the suggestive and coercive atmosphere in which a clinical psychologist paid by the FBI conducted interviews. *Id.* at 1476-77.

36. *See infra* notes 219-25 and accompanying text.

37. *Cf.* Midland Nat'l Bank v. Conlogue, 720 F. Supp. 878, 879 (D. Kan. 1989) (plane leased to customs agents for undercover work was found filled with marijuana after it crash landed). The trial judge in *Midland* sent copies of the convicted drug dealer's testimony to the Iran-Contra special prosecutor as evidence that the government acquiesces in illegal drug transactions. Dan Terry, *As the Nation Debates Abortion, A Judge is Cast as the Moderator*, N.Y. TIMES, Aug. 9, 1991, at A12, A18.

38. See discussion of co-conspirators exception *infra* at notes 156-71 and accompanying text.

39. Thirty-four of 47 opinions in the United States Court of Appeals dealing with the co-conspirators exception in 1990 were rendered in drug prosecutions. *See infra* note 166 and accompanying text.

watch what the government is doing—both because of governmental involvement in the narcotics trade and because the government's activities may pose a threat to individual liberties.[40]

Part I of this Article considers the meaning of confrontation from the vantage point of English history and the American colonial experience.[41] Part II examines the Supreme Court's approach to the Sixth Amendment and the Confrontation Clause. It concludes that the Court's evidentiary standard of reliability leads to illusory constitutional protection. Part III then suggests how statements made to prosecutorial authorities should be treated in order to further the policies expressed in the Bill of Rights.

I. THE HISTORICAL UNDERPINNINGS OF THE CONFRONTATION CLAUSE

The many commentators who have sought to clarify the meaning of the Confrontation Clause have almost all viewed the Clause in the abstract, separately from other Sixth Amendment and Bill of Rights guarantees.[42] From this isolationist perspective, they have concluded that the significance and scope of the right to confrontation cannot be gleaned with any assurance from explicit statements made about the meaning of

40. Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 907 n.93 (1987) ("[D]rug dealers today have become as much a magnet for the fears and suspicions of the public as the 'subversives' of the McCarthy era."). Judge Weinstein, in United States v. Riley, 906 F.2d 841 (2d Cir. 1990) (Weinstein, J. dissenting), explained:

> We are seeing a fateful confluence of decreased concern for private constitutional rights, increased pressure on law enforcement officials in a war on drugs, and sharp advances in forensic science. Sensitivity to the dangers to civil rights is required. It is a paradox that as the Eastern Europeans are escaping from the horrors of dictatorships that ignored civil rights and are expressing enormous esteem and respect for our legal protections, these protections are increasingly being denigrated in our country . . . [T]he power now afforded permits the government and the police to target individuals, particularly those who are pariahs of the moment, and to ignore their traditional rights in the home. As in the past, the law should stand firm to protect even those the majority deems unworthy. Reduce the rights of these few, and we threaten the rights of all.

Id. at 855.

41. Obviously, an Article of this length cannot explore several centuries of English history and the colonial experience in any depth. Part I of this Article attempts briefly to summarize the developments in England and the colonies of which we know the framers were cognizant.

42. The most notable exception is an article by Howard W. Gutman. *See* Gutman, *supra* note 16.

confrontation prior to the enactment of the Bill of Rights. The Clause was barely debated while the Sixth Amendment was under consideration,[43] and American documents predating the Sixth Amendment rarely discussed the purpose of confrontation. In looking for English antecedents to the notion of confrontation, most commentators have used a separatist approach as well. They have sought an explanation for the term's emergence in the American colonies without looking at the totality of the transformation of English criminal procedure between the Tudor era and the Glorious Revolution of 1689, and the similarly important changes occurring in American law and politics in the eighteenth century.

A. ENGLISH ANTECEDENTS

Although we now tend to think of the Sixth Amendment as a procedural and evidentiary code concerned with guaranteeing the common criminal a fair trial,[44] it must be remembered that the concepts incorporated in the amendment, and the other original amendments, developed in a political context in England.[45] To understand the criminal trial provisions in the Bill of Rights, one must appreciate how extensively the English crown relied on the criminal process to protect itself against its enemies.[46] The right to confront witnesses then emerges as a

43. *Id.* at 332 n.181.

44. *See* Strickland v. Washington, 466 U.S. 668, 684-85 (1984) (Sixth Amendment right to counsel exists to protect right to a fair trial); Faretta v. California, 422 U.S. 806, 818 (1975) (Sixth Amendment guarantees the right to a fair criminal defense); *see also* Randolph N. Jonakait, *Restoring the Confrontation Clause to the Sixth Amendment*, 35 UCLA L. REV. 557, 581-83 (1988) (describing the Sixth Amendment as a fundamental guarantee of a fair criminal proceeding).

45. Furthermore, very little information was available to the colonists or anyone else about ordinary criminal proceedings. *See* John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263, 264 (1978) ("As a generalization that requires only modest qualification, it can be said that the law reporting tradition was not extended to ordinary criminal trials until the nisi prius reports of the late eighteenth century.").

46. Professor Levy, after approving an unattributed remark by a federal judge that the framers "had in mind a lot of history which has been largely forgotten today" when they wrote the self-incrimination clause into the Fifth Amendment, goes on to comment:

> The remark applies with equal force, of course, to the right of representation by counsel, trial by jury, or any of the other, related procedural rights that are constitutionally sanctified. With good reason the Bill of Rights showed a preoccupation with the subject of criminal justice. The framers understood that without fair and regularized procedures to protect the criminally accused, there could be no liberty.

product of the same complex historical forces that gave rise to the other rights embodied in our Constitution and Bill of Rights.[47] Only then do the Sixth Amendment provisions make sense as part of a comprehensive constitutional scheme to restrict the unbridled exercise of governmental power.

Between the sixteenth century and the early eighteenth century, the common law system adopted and then rejected inquisitorial practices in criminal proceedings. Before the Tudor era, an open, public process operated in the common law courts.[48] At least until the middle of the sixteenth century, "publicity bathed the English common-law procedure."[49]

With the ascent of the Tudors, the English crown began to exercise more control over its enemies by importing techniques from the civil law into the indigenous, essentially accusatorial, system of criminal procedure.[50] Criminal proceedings took on a more inquisitorial slant with the use of preliminary examinations and increased reliance on prerogative courts. The Star Chamber, for example, used no juries and dispensed with pro-

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> They knew that from time immemorial, the tyrant's first step was to use the criminal law to crush his opposition.

LEONARD W. LEVY, ORIGINS OF THE FIFTH AMENDMENT 431 (1968); *see also* James F. Stephen, *Criminal Procedure from the Thirteenth to the Eighteenth Century, in* 2 SELECT ESSAYS IN ANGLO-AMERICAN HISTORY 443, 515 (1908) (noting that in the period between 1554 and 1637, when criminal procedure in the common law courts lacked many of the protections for the accused that later emerged, and many state trials took place before the Star Chamber, "there was no standing army, and no organized police on which the Government could rely" and the Government was not strong enough to be generous).

47. Professor Levy explains that "the history of the right against self-incrimination is enmeshed in broad issues of great import: the contests for supremacy between the accusatory and inquisitorial systems of criminal procedure, between the common law and the royal prerogative, and between the common law and its rivals, canon and civil law." LEVY, *supra* note 46, at 42. The same can be said for the rights set forth in the Sixth Amendment, including the right to confront adverse witnesses.

48. A known accuser began the proceedings by instigating the prosecution; presentment by the grand jury followed. Thereafter a written indictment was furnished to the accused, who ultimately received a public trial before a jury. *See* 3 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 620-23 (4th ed., 1935).

49. LEVY, *supra* note 46, at 34.

50. In the inquisitorial system used on the Continent, accusation and prosecution rested with the court; there was no definite accuser and the charges were neither formally specified nor revealed to the accused. The inquisitorial system's emphasis on secrecy continued throughout the proceedings. The names of witnesses against the accused were not revealed; the accused was tried by secret interrogatories, often obtained through the use of torture, and even the final sentence was not publicized. *See* 5 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 170-75 (2d ed., 1937).

cedure in extraordinary cases, using interrogations designed to trap the accused into a confession.[51] By the turn of the eighteenth century use of these inquisitorial features in English criminal proceedings had diminished in the common law courts, and the Star Chamber had been abolished.

During the sixteenth and seventeenth centuries, justices of the peace conducted preliminary examinations in ordinary criminal proceedings at common law. The justices—government officials who exercised police, administrative and judicial functions—privately interrogated the suspect, his accusers, and the witnesses against him.[52] These examinations were then introduced into evidence to the detriment of the defendant who had neither the assistance of counsel nor the ability to call witnesses on his behalf.[53] The accused still benefitted from having his case heard publicly and from having the jury act as decision maker.[54]

In cases of great political importance, however, the Privy Council, or the judicial members of the Council, examined the suspect and the other witnesses.[55] At trial, proof usually consisted of reading statements that had been made out of court, such as depositions, confessions of accomplices, and letters.[56] In his history of the common law, Stephen concluded that this prosecution on the basis of written statements "occasioned frequent demands by the prisoner to have his 'accusers,' *i.e.* the witnesses against him, brought before him face to face."[57]

In Sir Walter Raleigh's 1603 trial for conspiring to overthrow the King of England, the principal "witness," Lord Cob-

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51. LEVY, *supra* note 46, at 182. In Star Chamber proceedings, the accused could be committed to prison indefinitely pending trial. He was required to swear the oath *ex officio* that he would answer all questions truthfully, both orally and in writing—even though he was ordinarily not informed of the charges against him, nor allowed counsel. After swearing the oath, and without counsel, the defendant was confronted with interrogatories based on information furnished through the secret examinations. *Id.* at 182-84. Any inconsistencies between the accused's answers and the interrogatories were used to prove that he had violated his oath, and to force a confession. Torture was sometimes used. *See* 5 HOLDSWORTH, *supra* note 50, at 178-88.

52. 9 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 225-26 (2d ed. 1938).

53. *Id.* at 228.

54. *Id.* at 229.

55. Stephen, *supra* note 46, at 490.

56. 9 HOLDSWORTH, *supra* note 52, at 226 ("[I]n these trials the evidence against the prisoner was carefully prepared by the depositions of witnesses taken before the Council or the judges.").

57. Stephen, *supra* note 46, at 491.

ham, never testified before the jury. Instead, the prosecution relied almost exclusively on witnesses testifying to statements that Cobham had made to officers of the Crown when they examined him and on answers to interrogatories that Cobham had subscribed. Raleigh objected, stating the "Proof of the Common Law is by witness and jury: let Cobham be here, let him speak it. Call my accuser before my face, and I have done."[58] Although Sir Walter Raleigh's complaint is the best known instance of a defendant requesting production of the witness against him,[59] the same unsuccessful demand was made in other famous political trials reported in the *State Trial* series, such as Sir Nicholas Throckmorton's earlier trial for treason in 1554[60] and John Lilburne's 1637 trial for libel before the Star Chamber.[61]

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58. 2 COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS FROM THE EARLIEST PERIOD TO THE YEAR 1783 1, 16-17 (T.B. Howell ed., London, T.C. Hansard 1816) [hereinafter STATE TRIALS].

59. While some commentators credit the Sir Walter Raleigh trial as giving rise to the common law right of confrontation, *see, e.g.*, FRANCIS H. HELLER, THE SIXTH AMENDMENT 104 (1969); Kirst, *supra* note 20, at 490, others view this attribution as a myth, *see, e.g.*, Kenneth W. Graham, Jr., *The Right of Confrontation and the Hearsay Rule: Sir Walter Raleigh Loses Another One*, 8 CRIM. L. BULL. 99, 100 n.4 (1972), or a mistake, *see* Larkin, *supra* note 22, at 70. *But see* White v. Illinois, 112 S. Ct. 736, 745 (1992) (Thomas, J., concurrring, joined by Scalia, J.) (discussed *supra* notes 25-30 and accompanying text).

60. It was reported that in 1554 Throckmorton objected when he saw in the courtroom a person whose preliminary examination had been produced against him: "Master Croftes is yet living, and is here this day; how happeneth it he is not brought face to face to justify this matter, neither hath been all this time?" 1 STATE TRIALS, *supra* note 58, at 875-76; 9 HOLDSWORTH, *supra* note 52, at 216. Another writer reports:

> For though the Prisoner strongly insisted on . . . That which requireth the Witnesses to be brought face to face upon the Trial, the Council for the Crown went on in the method formerly practiced, reading Examinations and Confessions of Persons supposed to be Accomplices, some *Living and Amesneable*, others *lately Hanged for the same Treason.*

MICHAEL FOSTER, A REPORT OF SOME PROCEEDINGS ON THE COMMISSION FOR THE TRIAL OF THE REBELS IN THE YEAR 1746, IN THE COUNTY OF SURRY; AND OF OTHER CROWN CASES 234 (Michael Dodson ed., 3d ed.) (London, E. & R. Brooke 1792).

61. 3 STATE TRIALS, *supra* note 58, at 1315-22. Lilburne pled before the Star Chamber:

> I know it is warrantable by the law of God, and I think by the law of the land, for me to stand upon my just defence, and that my accusers ought to be brought face to face, to justify what they accuse me of. . . . Sir [the Earl of Dorset], I know you are not able to prove, and to make that good which you have said.—I have testimony of it, said he. Then, said I, produce them in the face of the open court, that we may

According to Wigmore and his followers, these proceedings were unfair because the prosecutions rested on rank hearsay, a concept that was not recognized until considerably later. In Wigmore's view, the admission of out-of-court statements against Raleigh and the other state trial defendants unjustly prejudiced them because they had no opportunity to test the credibility of the declarants by cross-examination. Wigmore equated the accused's right to have witnesses present before the jury with the right of cross-examination.[62] Consequently, when cross-examination is not needed because the hearsay is sufficiently reliable without adversarial testing, then production of the declarant is excused.[63] In this view, confrontation is an evidentiary rule that functions solely to further the ascertainment of the truth; it does not operate independently of the hearsay rule in the case of out-of-court statements.[64]

A closer look at the state trial proceedings demonstrates that the need for cross-examination is not the only dimension of the problem. Examined in a historical context, the defendants' complaints have less of an evidentiary than a procedural flavor. Review of the theories of proof prevalent then, the rationale for the hearsay rule, and the nature of the reforms that occurred in response to the state trials, indicates that the defendants' complaints speak more to the secrecy and potency with which the Crown was exercising its powers than to qualms about the inability to cross-examine declarants.

It is not until considerably after the seventeenth century state trials that the law of evidence recognized cross-examina-

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see what they have to accuse me of; and I am ready here to answer for myself, and to make my just defence.

Id.

Similarly, a 1653 pamphlet stated: "The ancient known right and law of England being, that no man be put to his defence at law, upon any man bare saying, or upon his own oath, but by presentment of lawful men, and by faithful witnesses brought for the same face to face . . . ." *The Just Defense of John Lilburn* (1653), *in* THE LEVELLER TRACTS: 1647-1653, at 450, 454 (William Haller & Godfrey Davies eds., 1944).

62. 5 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 1397 at 158 (Chadbourn rev. ed. 1974). Wigmore explained that "[t]here never was at common law any recognized right to an indispensable thing called confrontation *as distinguished from cross-examination.*" *Id.*

63. *Id.* "Moreover," Wigmore wrote, "this right of cross-examination thus secured was *not a right devoid of exceptions.*" The rule sanctioned "by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein." *Id.*

64. *Id.* § 1396, at 154 ("The satisfaction of the right of cross-examination . . . disposes of any objection based on the so-called right of confrontation.").

tion as one of the basic requisites for ensuring accurate proof.[65] The significance of cross-examination did not become apparent until lawyers were permitted to represent defendants in criminal cases.[66] Because the state trial defendants did not have the assistance of counsel on their behalf, measuring their demands against a standard of effective cross-examination seems somewhat of an anachronism.

Before cross-examination assumed its central role, the oath was regarded as the chief guarantor of evidentiary reliability. "[T]he opinion of the time seems to have been that if a man came and swore to anything whatever, he ought to be believed unless he was directly contradicted."[67] As noted earlier, in the state trials, proof often consisted of affidavits and depositions.[68] Nevertheless, defendants demanded to have the "witnesses" produced even though the absent witnesses had sworn to tell the truth, suggesting that more was at stake than the need to test the declarants' credibility. Furthermore, the practice of proving cases through examinations taken under oath before a justice of the peace or a coroner lost favor prior to the establishment of the hearsay rule.[69]

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65. Wigmore claimed that the hearsay rule was completely developed by the early 1700s. *Id.* § 1364, at 12. Professor Langbein appears to regard this contention with some skepticism. He suggested that evidentiary rules such as the hearsay rule did not develop until lawyers appeared upon the scene. Upon reviewing criminal trials in the Old Bailey, Langbein found that judges knew "that there was something wrong with hearsay, but even as late as the 1730s they do not appear to have made the choice between a system of exclusion or one of admissibility with diminished credit." Langbein, *supra* note 45, at 302; *see also* Stephan Landsman, *The Rise of the Contentious Spirit: Adversary Procedure in Eighteenth Century England*, 75 CORNELL L. REV. 497, 572 (1990) ("By the 1730s, the rudiments of the hearsay rule were established and at least sporadically applied.").

66. *See* Langbein, *supra* note 45, at 307 ("At least as early as the sixteenth century, and throughout the seventeenth century, defendants in political trials were complaining of the disparity that resulted when the prosecution was represented by counsel while the defense was denied it." (citation omitted)). Langbein suggests that the availability of counsel in criminal trials was a condition to the development of cross-examination and evidentiary doctrine such as the rule against hearsay. *Id.* at 300-02, 306.

67. 1 JAMES F. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 399-400 (London, MacMillan 1883).

68. See text accompanying *supra* note 56.

69. WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 429 (1978) (London 1721). Although he acknowledged that reports on the state trials indicate that depositions of witnesses were admitted in treason and felony cases in Tudor times, Hawkins stated as "settled" that examinations given under oath were admissible only if the maker was dead, unable to travel, or kept away by the accused. *Id.*

Sources closer in time than Wigmore to the state trials suggest that the objections to Cobham's statements may have rested at least in part on dissatisfaction with inquisitorial methods of obtaining proof. Gilbert's *The Law of Evidence*,[70] the first analytical treatise on the subject of evidence, provides a clue about the dangers inherent in sworn out-of-court statements procured by agents of the government. Gilbert is representative of views at the turn of the eighteenth century when the hearsay rule was viewed at most as a rule of best evidence and little significance was accorded to the need for cross-examination.[71] In writing disparagingly about proof by deposition, Gilbert stressed the methods by which depositions were taken:

> [T]he Credit of Depositions *ceteris paribus* falls much below the Credibility of a present Examination *viva voce*, for the Examiners and Commissioners in such Cases do often dress up secret Examinations, and set up a quite different Air upon them from they would seem if the same Testimony had been plainly delivered under the strict and open Examination of the Judge at the Assizes.[72]

Although Gilbert expressed doubt about the reliability of the statement—an evidentiary concern—this passage suggests that he disapproved of the secret inquisitorial method of obtaining proof. Admitting evidence that the government has created in this manner interferes with the ability of the jury to check pressures the government may have brought to bear against the witness.[73] Distrust of the witness to whom the statement was made does not implicate the hearsay rule, nor is it the business of the hearsay rule, or indeed of evidentiary rules, to devise procedures to protect the accused against undue pressures by prosecutors. If the demand for confrontation in the state trials rested in part on preventing the prosecution

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70. GEOFFREY GILBERT, THE LAW OF EVIDENCE (Garland Pub. 1979) (1754).

71. *See id.* at 112; Stephan Landsman, *From Gilbert to Bentham: The Reconceptualization of Evidence Theory*, 36 WAYNE L. REV. 1149, 1151-60 (1990) (discussing the significance of oath). The enormous respect accorded to statements under oath in part accounted for an accused not being permitted to call sworn witnesses on his behalf, as it was thought that the value that would be accorded to such testimony would be to the Crown's detriment. *See* Landsman, *supra* note 65, at 597-98 (discussing how Thomas Peake's *A Compendium of the Law of Evidence* shifted emphasis from oath to cross-examination as the central guarantor of the worth of oral testimony).

72. GILBERT, *supra* note 70, at 45. Gilbert states that hearsay statements should not be allowed as direct evidence, but voices no objection to the admission of hearsay statements given under oath as corroboration of a witness's testimony. *Id.* at 107-08.

73. *Cf.* 2 STATE TRIALS, *supra* note 58, at 22 (suggesting that torture was used in obtaining evidence against Raleigh).

from creating evidence in secret, then confrontation was expected to play a role that the hearsay rule performs only indirectly.[74]

Further support for according confrontation a procedural function in restraining the government emerges upon examination of the rationale for the hearsay rule. Its objective is to provide the jury with more reliable information so that a more accurate verdict will result. If confrontation is viewed solely as an evidentiary doctrine, then the error in Sir Walter Raleigh's trial consists of his not having been able to establish his innocence because of his inability to cross-examine his accuser.[75] Confrontation obviously possesses more than a purely evidentiary dimension, however, if the failure to produce a witness whose statement was crafted by the government amounts to error even when the statement possesses adequate indicia of reliability.

In searching for a historical rationale for confrontation, it is interesting to note that John Lilburne was one of the political defendants who called for his accusers to be produced.[76]

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74. Of course, sometimes the hearsay rule may bar evidence created by the prosecution. But as the discussion below indicates, hearsay exceptions have been interpreted to authorize the admission of prosecutorially produced evidence. *See infra* notes 152-65, 215-16 and accompanying text.

75. Whether Raleigh was in fact guilty has been the subject of some debate. Although many commentators assume that he was railroaded, *see, e.g.*, Graham, *supra* note 59, at 100, others express doubt about his innocence, *see, e.g.*, 9 HOLDSWORTH, *supra* note 52, at 227-28 (1931).

76. *See supra* note 61. In his 1649 trial for high treason held before the extraordinary Commission of Oyer and Terminer, Lilburne also constantly demanded the assistance of counsel. He stated:

> I know very well, and I read it in your own law-books, such a prerogative, as that in cases of treason no counsel shall plead against the king, hath been sometimes challenged to be the king's right by law; but, let me tell you, it was an usurped prerogative of the late king, with all other arbitrary prerogatives and unjust usurpations upon the people's rights and freedoms, which has been pretended to be taken away with him. And Sir, can it be just to allow me counsel to help me to plead for my estate, the lesser; and to deny me the help of counsel to enable me to plead for my life, the greater?

4 STATE TRIALS, *supra* note 58, at 1269, 1301-02. For a recent discussion of John Lilburne's demands, see Michael K. Curtis, *In Pursuit of Liberty: The Levellers and the American Bill of Rights*, 8 CONST. COMMENTARY 359, 370 (1991). Curtis states:

> Lilburne, citing Coke and Parliamentary declarations against the King, insisted that due process comprised a cluster of legal rights of the accused including apprehension by a legal warrant, the right against self incrimination, confrontation of one's accuser, imprisonment only for a specific and previously forbidden crime, jury trial, and presentment by grand jury.

Lilburne is far more famous for another demand he made: his repeated objection to the prosecution's use of the oath *ex officio* led to the oath's abolition and the recognition of the privilege against self-incrimination.[77] In his many trials Lilburne defended himself by arguing procedure and rights.[78] He was undeniably guilty of the crimes with which he was charged.[79] His objection to the oath hinged on the unfairness of being forced to create evidence against himself, evidence that might be inconsistent with the evidence the government had created through secret examinations of witnesses.[80] The objection to the oath *ex officio* and the demand for confrontation are thus intertwined; both can be interpreted as reflecting distaste for an inquisitorial system that makes it advantageous for the government to create evidence in secret.[81] The inability of the defendant to counter that advantage effectively, given the power of the government, renders the procedure objectionable even

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Id.

77. *See* LEVY, *supra* note 46 (discussing Lilburne's trials and their effect on the recognition of the privilege against self-incrimination).

78. In his 1649 trial Lilburne also demanded a public trial, 4 STATE TRIALS, *supra* note 58, at 1271-74, challenged the jurisdiction of the court on the ground that it was not a regular common law court, *id.* at 1274-78, 1283, objected to the jury not being from the county in which the offense was committed, *id.* at 1283, demanded a copy of the indictment, *id.* at 1282-83, 1296, and demanded the right to call witnesses, *id.* at 1309.

79. 1 STEPHEN, *supra* note 67, at 365-66; *see* LEVY, *supra* note 46, at 273, 276.

80. *See* 1 STEPHEN, *supra* note 67, at 366.

81. Bernard D. Meltzer, *Required Records, The McCarran Act, and the Privilege Against Self-Incrimination*, 18 U. CHI. L. REV. 687, 687-88 (1951). Meltzer explains:

> The origins of the privilege are associated with the struggle of Englishmen against the High Commission and the Star Chamber whose techniques included not only interrogation of suspects under the oath ex officio, but also the imprisonment and torture of recalcitrants. . . . Because it symbolizes the right of the individual not to be hounded by the state, the privilege has seemed more important, and limitations on its scope have seemed more alarming, whenever liberty has been threatened.

Id. Of course, many other justifications have been put forth for the privilege against self-incrimination. *See* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986). The classic attack on the privilege by Bentham and his followers—that it should be thrown out because it does not foster the truth—is not dissimilar to the Supreme Court's diminution of the right to confrontation: because the only value the Court sees served by the Confrontation Clause is more reliable evidence, the need for confrontation vanishes when some other guarantee of accuracy exists.

when the government's method of applying pressure ferrets out the truth.

The conclusion that confrontation emerged as part of a procedural package for diminishing the government's inquisitorial powers is strengthened by a review of other developments that limited the Crown's prerogatives. The Court of Star Chamber, which relied exclusively on inquisitorially obtained statements and did not utilize a jury, was abolished in 1641.[82] In the common law courts, the role of the jury was gradually strengthened,[83] and the procedural process that had given the Crown so great an advantage over the accused changed in response to demands made in the state trials and the new political climate. Legislation passed in the aftermath of the Glorious Revolution of 1689 confirmed the reforms.[84]

Not surprisingly, in light of their political genesis, these reforms originally applied only in prosecutions for treason.[85] By 1696, defendants accused of high treason won the right to a copy of the indictment, to the assistance of counsel, and to subpoena witnesses to testify in their defense.[86] Parliament clarified statutes that required treason to be proved by two witnesses by ensuring that two witnesses had to be present at the trial.[87] In 1702, the right to have witnesses sworn on behalf of the defendant was extended to felony prosecutions.[88] Although the privilege of counsel was not statutorily extended to persons accused of a felony until 1836 in England, from the 1730s on defense counsel were increasingly allowed to examine and cross-examine witnesses.[89]

Thus, by the beginning of the eighteenth century, a package of procedures had evolved in England to curtail the power of the Crown. The next section considers whether the develop-

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82. LEVY, *supra* note 46, at 281-82.

83. In Bushell's case decided in 1670, the principle was established that jurors could disregard the evidence without suffering punishment. *See id.* at 38; THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 134 (5th ed. 1956).

84. *See* HELLER, *supra* note 59, at 10.

85. *See* 9 HOLDSWORTH, *supra* note 52, at 235.

86. Treason Act, 1695, 7 & 8 Will. 3 c.3; *see* HELLER, *supra* note 59, at 9-10; 9 HOLDSWORTH, *supra* note 52, at 235 (1931); LEVY, *supra* note 46, at 321.

87. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND *352 (University of Chicago Press 1979) (1765); *see also* James G. Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. PITT. L. REV. 99, 106 (1983).

88. 9 HOLDSWORTH, *supra* note 52, at 235.

89. Langbein, *supra* note 45, at 311.

ments in England could have affected the framers in their formulation of the Bill of Rights.

B. THE COLONIES

While Sir Walter Raleigh's trial is often mentioned as a major influence on the drafting of the Confrontation Clause, some commentators have expressed doubt whether the effect of an event in 1603 would be manifested in 1791.[90] Their skepticism is fueled by the omission of any mention of confrontation in the seventeenth century colonial documents that set forth the rights to be granted in the various colonies.[91] The colonists's knowledge of seventeenth century events is of some importance. If the colonists did not perceive a connection between the notion of confrontation and the reduction of the inquisitorial powers of the Crown, then confrontation looks more like Wigmore's purely evidentiary doctrine than a procedure that also aspires to prevent the government from leaning on witnesses and concealing the process from the jury.[92]

Analyses that stress the silence of the seventeenth century

90. Several commentators are skeptical of the influence Sir Walter Raleigh's trial had on confrontation theory. *See, e.g.*, Larkin, *supra* note 22, at 70; Graham C. Lilly, *Notes on the Confrontation Clause and* Ohio v. Roberts, 36 U. FLA. L. REV. 207, 208-09 (1984).

91. For instance, the Massachusetts Body of Liberties of 1641, which is considered a forerunner of the federal Bill of Rights, is silent about confrontation. This document, although written by the colonists, was, however, subject to Crown veto. *See* BERNARD SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 49-50 (1971). Demanding rights against the Crown in political trials was unlikely to be feasible or expedient while Charles II remained on the throne.

92. Professor Jonakait suggests yet a different role for the Confrontation Clause. He argues that the Clause "is not a minor adjunct of evidence law, but is one of a bundle of rights that assures the accused the protection of our adversary system. It assures the accused the right to the adversarial testing of the prosecution's evidence." Jonakait, *supra* note 44, at 622. The purpose of this right is "to assure that the jury will not overvalue the evidence against the defendant." *Id.* Consequently all out-of-court statements must be excluded unless the declarant is produced "except when the prosecutor establishes the lack of a reasonable probability that the accused's cross-examination of the declarant would have led the jury to weigh the evidence more favorably to the accused." *Id.* Although Professor Jonakait's adversary system rationale is preferable to the reliability formula of the Supreme Court, his analysis is troublesome on two grounds: statements elicited by the government should stand on different grounds than other statements for reasons pointed out in this Article, and his conclusion substitutes another instrumental rationale that allows dispensation with confrontation when the function of confrontation has been otherwise satisfied. The danger is that determining whether evidence will be misweighed to the accused's detriment in the absence of cross-examina-

colonial documents pay insufficient attention to how the ideology of the framers evolved. They overlook that if, as suggested, confrontation is part of a pattern of procedural reforms that gradually curtailed the inquisitorial powers of the Crown, then the outlines of that pattern did not emerge clearly until after the statutes enacted in the aftermath of the Glorious Revolution. Furthermore, the first edition of the state trials reports, which included the trials of Raleigh, Wilburton, and Lilburne, did not appear until 1719.[93] Perhaps most importantly, the relevance of the English experience may not have been fully recognized until the 1760s when Parliament started to enact inquisitorial methods to control the colonists. In 1765 the Stamp Act enlarged the jurisdiction of the vice-admiralty courts, allowing them to sit without juries and to examine witnesses in chambers upon interrogatories.[94] Shortly thereafter Parliament resolved that all colonial traitors would be tried in England—thereby depriving them of a jury from the vicinage, the ability to call witnesses on their behalf, and virtually ensuring that the Crown's evidence would be in the form of depositions.[95] Viewed against the backdrop of increasing knowledge about English criminal procedure and the gains of the Glorious Revolution, this reversion to inquisitorial procedures may have struck the colonists as a step backwards.

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tion is as malleable a standard for trial judges as determining the reliability of evidence, and ultimately turns into an evidentiary standard as well.

93. Three more editions followed by 1781. *See* 12 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 127-30 (2d ed. 1938) (describing the various editions). Until the late eighteenth century very few reports of criminal trials were available except for the state trials. *See* Langbein, *supra* note 45, at 264-65.

94. In 1768 John Adams defended John Hancock, who had been sued in Admiralty by Jonathan Sewall, the advocate general, for penalties regarding the alleged smuggling of wine. *See* 2 LEGAL PAPERS OF JOHN ADAMS 173-210 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965). A patriot pamphlet, *A Journal of the Times*, commented on the Star Chamber method of interrogation, and the examination of witnesses in chambers. *Id.* at 182 n.35. Reports of the Hancock trial were widely reported in the colonies' newspapers. *See* OLIVER M. DICKERSON, BOSTON UNDER MILITARY RULE (1768-69) 18-84 (1936) (discussing reports in New York and Boston newspapers). Adams wrote in his copy of his argument: "Examinations of witnesses upon Interrogatories, are only by the Civil Law. Interrogatories are unknown at common Law, and Englishmen and common Lawyers have an aversion to them if not an Abhorrence of them." 2 LEGAL PAPERS OF JOHN ADAMS, *supra*, at 207; *see also id.* at 341 ("The Examination of the Prisoner himself (if not on oath) may be read as Evidence against him; but the Examination of others (though not on oath) ought not to be read if they can be produced, viva voce.").

95. *See* Larkin, *supra* note 22, at 71-72.

It seems abundantly clear that the framers were familiar with the battle against an overly inquisitorial system. The history of the common law was influential in furnishing the Revolutionary generation with what Professor Bailyn has termed a "framework of historical understanding."[96] To the colonists, the evolution of the common law in the period from Magna Carta to the Glorious Revolution recorded the successful struggle to strengthen the rights of citizens vis-a-vis the Crown.[97] It provided the colonists, and hence the framers, with an explanation of how England had ultimately arrived at a "constitution" capable of preserving liberty by securing rights to different members of the community.[98]

The colonists certainly knew of the historical developments in England that transformed criminal procedure and reduced the ability of the Crown to tyrannize its subjects. By the eighteenth century, lawyers trained in England who were cognizant of the reforms brought about by the Glorious Revolution were

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96. BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 31 (1967). Bailyn explains:

> To the colonists [the law] was a repository of experience in human dealings embodying the principles of justice, equity, and rights; above all, it was a form of history—ancient, indeed immemorial, history; constitutional and national history; and, as history, it helped explain the movement of events and the meaning of the present.

Id.

97. *See* LEVY, *supra* note 46, at 338 ("In American thinking, the common law was a repository of constitutional principles that secured individual rights against government intrusion."); *see also The Proceedings of the Convention of the Representatives of the New Hampshire Settlers* 16 (1776), *in* JULIUS GOEBEL JR. & T. RAYMOND NAUGHTON, LAW ENFORCEMENT IN COLONIAL NEW YORK 446 (1944) (pamplet attacking a special act passed by the New York Legislature in 1774 that enacted a version of the English riot act). The pamplet stated: "May it be considered that the legislative authority of the Province of New York had no Constitutional right or power to make such Laws and consequently that they are Null and Void from the Nature and Energy of the English Constitution." *Id.* It closed with the following verses:

> When *Caesar* reigned King at *Rome*,
> Saint *Paul* was sent to hear his Doom,
> But *Roman Law* in a criminal Case,
> Must have the Accuser Face to Face,
> Or *Caesar* gives a flat Denial—
> But here's a Law made now of late;
> Which destines Men to awful Fate
> And Hangs and Damns without a Trial . . . .

Id. n.300.

98. *See* BAILYN, *supra* note 96, at 175-98 (discussing how the notion of the unwritten constitution which the colonists thought had evolved in England became transformed into a desire for a written constitution).

professionally active in the colonies.[99] Furthermore, the colonists were well read in the law; they knew the work of commentators and had access to the state trial reports,[100] standard treatises such as Gilbert's, and works by Foster and Hale that relied heavily on the state trials.[101]

Any doubt that the framers knew about the evolution of English criminal procedure vanishes upon examination of Blackstone's *Commentaries*, a book that "played a unique role in the development of the fledgling American legal system."[102] The *Commentaries*, first published in 1765-69, were originally imported; in response to growing demand, an American edition

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99. *Id.* at 30-31. The lawyers who came to the colonies at the end of the seventeenth century were knowledgeable about the procedural reforms achieved after the Glorious Revolution. *See* HELLER, *supra* note 59, at 20. Professor Heller explains that many of the lawyers who arrived in the colonies in the closing years of the seventeenth century had been trained at the Inns of Court in London,

> and brought with them, applied, and enforced the procedural modifications enacted in England after the Revolution of 1688. Thus these reforms, the new liberality as to witnesses and counsel for the accused, became associated in the minds of the people with the aims of greater freedom that had caused the overthrow of the Stuarts and Tories.

Id.; *see also* CHARLES WARREN, A HISTORY OF THE AMERICAN BAR (1911).

100. Symposium, *Historical Development of the American Lawyer's Library*, 61 L. LIBR. J. 440, 444 (1968) [hereinafter *Historical Development*]. One of the cases contained in the *State Trial* series was cited by the Pennsylvania Supreme Court as early as 1786. *See* Belt v. Dalby, 1 U.S. (1 Dall.) 167 (Pa. S. Ct.).

101. BAILYN, *supra* note 96, at 30-31. Foster, issued in 1762, discussed the Raleigh case in his Treatise, stating that Raleigh's "Trial, having been long since Printed and prefixed to His History, hath been more generally Read and Censured than Others, I do not see, that That Case . . . did in point of hardship differ from Many of the Former." FOSTER, *supra* note 60, at 234-35; 2 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN, 284-86 (P.R. Glazebrook ed., Professional Books 1971) (1736) (discussing the advantages of oral testimony in open court compared to written information); *see also* Curtis, *supra* note 76, at 392 ("Probably the ideas of the Levellers, ideas that grew out of and merged with other seventeenth century ideas of liberty and law, contributed significantly, if not always directly, to the mixture of historic liberties and natural rights that became one American tradition.").

102. Stanley N. Katz, *Introduction* to 1 BLACKSTONE, *supra* note 87, at iii. In public political literature written between 1775 and 1790, Blackstone was the second most frequently cited secular writer after Montesquieu. *See* DONALD S. LUTZ, THE ORIGINS OF AMERICAN CONSTITUTIONALISM 142-45 (1988); *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102 (2d ed. 1985) ("When Blackstone's *Commentaries* were published (1765-69), Americans were his most avid customers. At last there was an up-to-date shortcut to the basic themes of English law. An American edition was printed in 1771-72, on a subscription basis, for sixteen dollars a set; 840 American subscribers ordered 1557 sets—an astounding response.").

was reprinted in Philadelphia in 1771-72.[103] Blackstone commented on the right to compulsory process, the right of the accused to know the charges, the role of counsel,[104] and the accused's right to be tried by jurors of the vicinage. His discussion of these procedures appears in Chapter 27 alongside his acknowledgment of the central role of the jury in protecting citizens against governmental overreaching, especially in criminal trials.[105] Blackstone also cross-referenced his discussion of juries in civil cases, noting that "[w]hat was said of juries in general, and the trial thereby, in *civil* cases, will greatly

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103. *Historical Development*, *supra* note 100, at 447.

104. 4 BLACKSTONE, *supra* note 87, at *349-54. He criticized the English rule that still did not provide for counsel in felony cases at this time. *See* Powell v. Alabama, 287 U.S. 45, 60-66 (1932) (discussing origins of right to counsel provision in Sixth Amendment).

105. Blackstone's characterization of trial by jury "as the grand bulwark" of an Englishman's liberties is a conclusion with which the drafters of the Bill of Rights were obviously in agreement. 4 BLACKSTONE, *supra* note 87, at *349. His "panegyric" to the virtues of the jury coincided with the view of the authors of the Bill of Rights, who placed juries at the heart of three of the amendments. Furthermore, Blackstone perceived trial by jury as fulfilling two different functions: first a trial by jury was the best mode of decision for investigating the truth of facts, 3 *id.* at *379-80, and second it was a mechanism for preserving the liberties of the people against the prerogative of the Crown. *Id.* at *349. As to the second function, he wrote:

> The antiquity and excellence [of jury trial] . . . . hold[s] much stronger in criminal cases; since, in times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another . . . . Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown.

Id. at *349; *see also* Amar *supra* note 13, at 1183 (the key role of the jury in the Bill of Rights "was to protect ordinary individuals against governmental overreaching").

Blackstone's explanation of the political role of the jury has been echoed by the Supreme Court in its interpretation of the right to jury trial provision of the Sixth Amendment. *See* Duncan v. Louisiana, 391 U.S. 145, 151-52 (1968). The *Duncan* Court explained:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.

Id. at 155-56 (citations omitted).

shorten our present remarks."[106]

In Chapter 23 in the midst of a "panegyric" to juries, Blackstone considered the advantages of the English system of requiring proof by oral testimony in open court before the parties, their attorneys, the public, the judge, and the jury. The passage, in which he mentioned "the confronting of adverse witnesses," begins:

> This open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth, than the private and secret examination taken down in writing before an officer, or his clerk, in the ecclesiastical courts, and all others that have borrowed their practice from the civil law: where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal. There an artful or careless scribe may make a witness speak what he never meant, by dressing up his depositions in his own forms and language; but he is here at liberty to correct and explain his meaning, if misunderstood, which he can never do after a written deposition is once taken. Besides the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled: and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial.[107]

Although Blackstone acknowledged confrontation's role in determining the truth, he viewed the doctrine institutionally as part of the common law heritage that is antithetical to the secret examinations that are a component of inquisitorial procedures.[108] Blackstone may well not have discussed confrontation

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106. 4 BLACKSTONE, *supra* note 87, at *344.

107. 3 *Id.* at 345 (citations omitted).

108. The excerpt from Blackstone recited above, see text accompanying note 107, was quoted in its entirety in one of the anti-federalist essays of Cincinnatus published in the *New York Journal* in November-December 1787. *Essays by Cincinnatus* (1787), *in* 6 THE COMPLETE ANTI-FEDERALIST 5 (Herbert J. Storing ed., 1981). Cincinnatus read the Blackstone passage as explaining how the common law system, including the confrontation of witnesses, worked to curb tyranny. Immediately after the quote, he wrote:

> They who applaud the practice of civil law courts, must either have seen very little of such practice not to know that it is liable to infinite fraud, corruption, and oppression. As far as it prevails in the English system of jurisprudence, from which we derive ours, it is a remnant of ecclesiastical tyranny. The free and pure part of the system, that is the common law courts, have ever cautiously guarded against its encroachments, and restrained its operation. All great judges have reprobated it, except Lord Mansfield. He indeed, has been as desirous of extending it in England, as he was of extending parliamentary power into America; and with the same view—to establish tyranny.

Id. at 15.

at all but for its interrelationship with the role of the jury, which both he and the framers of the Bill of Rights viewed as the principal safeguard of a people's liberties.[109] The *Commentaries* otherwise demonstrate no concern with the law of evidence even though this area of the law was in the midst of change.[110]

The popularity of Blackstone and the relevance of confrontation as part of a parcel of politically derived rights perhaps explain why George Mason inserted a Confrontation Clause into the 1776 Virginia Declaration of Rights,[111] which became

109. "[A] celebrated French writer [Montesquieu], who concludes, that because Rome, Sparta, and Carthage have lost their liberties, therefore those of England in time must perish, should have recollected that Rome, Sparta, and Carthage, were strangers to the trial by jury." 3 BLACKSTONE, *supra* note 87, at *379; *see also* Matthew Hale, *History of the Common Law* (1713), *in* 5 THE FOUNDERS' CONSTITUTION 248 (Philip B. Kurland & Ralph Lerner eds., 1987) (praising testimony of witnesses in open court and not before "a Commissioner or Two, and a couple of Clerks" and that is oral, "and not in Writing, wherein oftentimes, yea too often, a crafty Clerk, Commissioner, or Examiner, will make a Witness speak what he truly never meant, by his dressing of it up in his own Terms, Phrases, and Expressions"). Hale praises this procedure for producing the truth and relates this process to the right of the jury to ignore the evidence; he notes that oral testimony provides jurors with "full information" and notes that "they are not bound to give their Verdict according to the Evidence or Testimony" and may "pronounce a Verdict contrary to such Testimonies, the Truth whereof they have just Cause to suspect." *Id.*

110. Blackstone has been faulted for not being "alert to the slow rise of the law of criminal evidence." Thomas A. Green, *Introduction* to 4 BLACKSTONE, *supra* note 87, at ix. It is interesting to note that Story in his *Commentaries* made the same criticism about the Sixth Amendment—that it was insufficiently sensitive to evidentiary concerns. After paraphrasing the provisions of the Amendment by stating: "The trial is always public; the witnesses are sworn, and give in their testimony (at least in capital cases) in the presence of the accused," Story states:

> Without in any measure impugning the propriety of these provisions, it may be suggested, that there seems to have been an undue solicitude to introduce into the constitution some of the general guards and proceedings of the common law in criminal trials, (truly admirable in themselves) without sufficiently adverting to the consideration, that unless the whole system is incorporated, and especially the law of evidence, a corrupt legislature, or a debased and servile people, may render the whole little more, than a solemn pageantry.

Joseph Story, *Commentaries on the Constitution*, *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 109, at 296.

111. *Virginia Declaration of Rights* § 8 (1776), *in* 1 THE FOUNDERS' CONSTITUTION, *supra* note 109, at 6. It provided:

> That in all capital or criminal prosecutions a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence in his favour, and to a speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, nor can he be compelled to

the model for similar bills in seven other colonies.[112] Although virtually no legislative history exists for these provisions, the anti-federalist debate protesting the absence of a Bill of Rights in the proposed federal constitution is illuminating. It indicates that the absence of confrontation and the other procedures now detailed in the Sixth Amendment were viewed *in toto* with the right to trial by jury as necessary to safeguard civil liberties against governmental abuse. For instance, an essay by the Impartial Examiner that appeared in the *Virginia Independent Chronicle* argued:

> [I]f you pass this new constitution, you will have a naked plan of government unlimited in its jurisdiction, which not only expunges your bill of rights by rendering ineffectual, all the state governments; but is proposed without any kind of stipulation for any of those natural rights, the security whereof ought to be the end of all governments. Such a stipulation is so necessary, that it is an absurdity to suppose any civil liberty can exist without it. . . . For instance, if Congress should pass a law that persons charged with capital crimes shall not have a *right to demand the cause or nature of the accusation*, shall not be *confronted with the accusers or witnesses, or call for evidence in their own favor;* and a question should arise respecting their authority therein, — can it be said that they have exceeded the limits of their jurisdiction, when *that* has no limits; when no provision has been made for such a right? — When no responsibility on the part of Congress has been required by the constitution?[113]

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give evidence against himself; that no man be deprived of his liberty except by the law of the land, or the judgment of his peers.

Id.

112. Larkin, *supra* note 22, at 75-76.

113. *The Impartial Examiner*, *in* 5 THE COMPLETE ANTI-FEDERALIST, *supra* note 108, at 185 (emphasis in original); *see also Debate in Massachusetts Ratifying Convention* (Jan. 30, 1788), *in* 5 THE FOUNDERS' CONSTITUTION, *supra* note 109, at 260. During the debate in the Massachusetts Ratifying Convention Holmes complained of deficiencies with regard to the trial by jury provision. He continued:

> The mode of trial is altogether indetermined; whether the criminal is to be allowed the benefit of counsel; whether he is to be allowed to meet his accuser face to face; whether he is to be allowed to confront the witnesses, and have the advantage of cross-examination, we are not yet told. . . . On the whole, when we fully consider this matter, and fully investigate the powers granted, explicitly given, and specially delegated, we shall find Congress possessed of powers enabling them to institute judicatories little less inauspicious than a certain tribunal in Spain, which has long been the disgrace of Christendom: I mean that diabolical institution, the *Inquisition*.

Id. Echoing similar concerns, one colonist asserted:

> Security against expost facto laws, the trial by jury, and the benefits of the writ of habeas corpus, are but a part of those inestimable rights the people of the United States are entitled to . . . . men are entitled to these rights and benefits in the judicial proceedings of our state courts generally: but it will by no means follow, that they will be en-

Thus, two hundred years ago when the Bill of Rights was enacted, the right to confrontation was viewed in conjunction with the other procedural rights surrounding trial by jury. Confrontation was part of an arsenal designed not only to ensure accurate results in criminal trials, but also to restrain the government in criminal trials from acting in a covert, repugnant manner that would be concealed from the people.

II. THE SUPREME COURT'S INTERPRETATION OF SIXTH AMENDMENT AND THE CONFRONTATION CLAUSE

A. SIXTH AMENDMENT RESTRAINTS ON INTERROGATION OF WITNESSES

If the premise of the previous section is correct—that the concept of confrontation emerged as part of a package of complementary procedural rights aimed at constraining prosecutorial power—then the values the Supreme Court ascribes to the other procedural rights ought to be relevant in assessing how the Confrontation Clause should function.[114] This section looks first at the Court's Sixth Amendment jurisprudence to determine whether the need to restrain prosecutors has affected the interpretation of any of the other provisions in the Sixth Amendment.

At least two lines of cases suggest that the Court has recognized the need to adopt special prophylactic rules when the prosecution is in a position to orchestrate proceedings to shape the evidence that the trial court will admit against a defendant. In a series of cases commencing with *Massiah v. United States*,[115] the Supreme Court has interpreted the right to counsel to apply when government agents interrogate an indicted defendant, even though the right directly interferes with ascertaining the truth. In *Massiah*, the defendant thought that he was speaking to a friend, rather than an agent for the prosecution, and had no incentive to lie.[116] The dissent in *Massiah* ob-

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titled to them in the federal courts, and have a right to assert them, unless secured and established by the constitution or federal laws.

Letters from the Federal Farmer, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 108, at 327-28; *see also Essays of Brutus*, *in* 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 108, at 374-75.

114. *Cf.* SUTHERLAND, *supra* note 17, § 51.03, at 467-97 (discussing concept of *in pari materia*).

115. 377 U.S. 201 (1964).

116. Massiah had retained counsel after being indicted and was out on bail when a co-defendant approached him on a city street to discuss the case. Un-

jected to the establishment of:

> a constitutional rule [that bars] the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it—whether the accused committed the act with which he is charged. Without the evidence, the quest for truth may be seriously impeded and in many cases the trial court, although aware of proof showing defendant's guilt, must nevertheless release him because the crucial evidence is deemed inadmissible.[117]

The *Massiah* line of cases excludes reliable evidence produced through prosecutorial interrogation if obtained in a manner that impinges on a procedural right granted by the Sixth Amendment. Because the restriction applies only when the statements are "induced,"[118] these cases implicitly acknowledge the dangerous ability of the government to shape evidence through inquisition, and the inappropriateness of such behavior in an accusatorial system of criminal procedure.

In several line-up cases commencing with *United States v. Wade*,[119] the Supreme Court also noted the need to devise a procedure that would prevent the accused's fate from being determined by the police's out-of-court activities rather than by the jury. In *Wade*, the Court mandated excluding evidence of an identification made at a line-up conducted in the absence of defendant's counsel. The Court explained: "The trial which might determine the accused's fate may well not be that in the courtroom but that at the pretrial confrontation, with the State aligned against the accused, the witness the sole jury, and the accused unprotected against the overreaching, intentional or unintentional."[120] The Court held the evidence must be excluded even when other existing evidence corroborates the accuracy of the identification.

In *Massiah* and the line-up cases, the Court asserted that right to counsel is absolute regardless of the reliability of the accused's statement[121] or the witness's identification. In these

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known to Massiah, the co-defendant had decided to cooperate with federal agents, and had been equipped with a recording device. *Id.* at 202-03. A majority of the Supreme Court held that the defendant's damaging admissions should be excluded because government agents deliberately elicited them from him after he had been indicted and in the absence of his counsel. *Id.* at 206.

117. *Id.* at 208 (White, J., dissenting).

118. Kuhlmann v. Wilson, 477 U.S. 436, 456 (1986) (no violation of *Massiah* when government informant functioned solely as listening post); *cf.* United States v. Henry, 447 U.S. 264, 271 (1980) (paid informer in same cellblock as defendant was not a "passive listener").

119. 388 U.S. 218 (1967).

120. *Id.* at 235.

121. In *Massiah*, the government filed a tape recording of the conversation

situations the government agent is potentially affecting the evidence at a "critical stage" of the prosecution.[122] The accused receives additional protection against interrogation because the Fifth Amendment operates through *Miranda* to secure the objectives of the Bill of Rights prior to the "critical" stage.[123]

In the case of witnesses, however, the Court has held that right to counsel does not attach when the prosecution interrogates or otherwise obtains statements from witnesses prior to trial, even after the initiation of adversary judicial proceedings.[124] In 1973, the Court did not consider this stage critical because it assumed that confrontation at trial will reveal the details of the interrogation.[125] Now that the Court views confrontation as serving solely a truth-serving function, however, confrontation at trial is excused when the declarant's statement satisfies a firmly rooted hearsay exception or possesses adequate indicia of reliability. Far less protection is therefore afforded via the Confrontation Clause against statements elicited by the prosecution than by *Miranda* and the right-to-counsel cases, which provide absolute protection regardless of whether the statement in question is relevant and reliable.[126] This inconsistency fails to acknowledge that the development of the right to confrontation was inextricably interwoven with the evolution of the other protections embodied in the Sixth and Fifth Amendments, and that these constitutional guarantees sought to achieve more than accurate fact-finding.[127]

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between accused and the co-defendant with the clerk of the Court, and argued that the recording confirmed that no coercion had occurred. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 431 n.b (7th ed., 1990).

122. United States v. Gouveia, 467 U.S. 180 (1984) (right to counsel attaches only after the initiation of adversary proceedings against the defendant).

123. Miranda v. Arizona, 384 U.S. 436 (1966) (procedural safeguards required in connection with custodial interrogation).

124. United States v. Ash, 413 U.S. 300 (1973) (refusing to extend *Wade* right of counsel to government conducted post-indictment photographic display for the purpose of allowing witness to identify defendant).

125. In *Ash*, the Court surveyed a number of instances in which right to counsel does not attach because the stage is not "critical." The Court explained that "the risks inherent in any confrontation [prior to trial between the prosecutor and witness] still remain, but the opportunity to cure defects at trial causes the confrontation to cease to be 'critical.'" 413 U.S. at 316. Both the majority and Justice Stewart in his concurring opinion assumed that the witness would testify at trial and would be cross-examined. *Id.* at 314, 325.

126. *Cf.* Maryland v. Craig, 110 S. Ct. 3157, 3172 (1990) (Scalia, J. dissenting) ("[T]he Confrontation Clause does not guarantee reliable evidence; it guarantees specific trial procedures that were thought to *assure* reliable evidence.").

127. Comment, *The Sixth Amendment as Constitutional Theory: Does*

B. THE SUPREME COURT'S CONFRONTATION CASES

The Court did not address the Confrontation Clause until the late nineteenth century, an understandable consequence of the scant attention originally paid to the Bill of Rights and the limited criminal jurisdiction of the federal courts early in the nation's history. Interest in confrontation grew after 1965 due to the enormously increased volume of cases to which the doctrine applies,[128] as well as the acceptance of Wigmore's theory of confrontation as an evidentiary doctrine, an assumption that came to have more and more significance as codification created new hearsay exceptions.

1. The Confrontation Clause: The Early Cases

In 1895, the Court engaged in what was until the 1960s the most extensive discussion of the meaning of the Confrontation Clause. The Court's opinion in *Mattox v. United States*[129] supports the conclusion that confrontation is an absolute right, and that the objective of the provision was restraint of inquisitorial questioning by the government.

The issue in *Mattox* was the admissibility of transcripts of testimony that prosecution witnesses who had since died had given at the defendant's prior trial. The defendant argued that the admission of prior testimony transgressed the clear command of the Confrontation Clause. The Court disagreed, concluding that former testimony was admissible because the Confrontation Clause had been adopted subject to pre-existing exceptions authorizing the receipt of evidence that did not satisfy the literal command of confrontation.[130] One such excep-

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Originalism Require That Massiah *Be Abandoned?*, J. CRIM. L. & CRIMINOLOGY 423, 457 (1991). The Comment explains:

> Along with the right to counsel, the sixth amendment guarantees an accused the right to a speedy and public trial by jury, the right to notices of charges, and the right to both confront and compel witnesses. These protections, when considered in conjunction with the fifth amendment's guarantee against self-incrimination, offer proof that the ratifiers *intended* to establish a constitutionally mandated system of criminal procedure that valued the rights of the accused and the integrity of the prosecutorial system over the untrammelled pursuit of truth.

Id. (citations omitted).

128. In that year the Court made the right to confrontation obligatory on the states through the Fourteenth Amendment. *See* Pointer v. Texas, 380 U.S. 400, 405 (1965).

129. 156 U.S. 237 (1895).

130. *Id.* at 243. The Court stated:

> We are bound to interpret the constitution in the light of the law as it

tion was former testimony given at a prior proceeding at which the defendant had the opportunity of "seeing the witness face to face, and of subjecting him to cross examination."[131]

The Court discussed the contours of the former testimony exception extensively, distinguishing the kinds of statements deemed admissible from depositions and *ex parte* affidavits which it determined were "the primary object" of the Confrontation Clause to exclude.[132] Statements to a governmental agent that were never subject to confrontation and cross-examination would thus clearly not satisfy constitutional requirements. That this point was obvious to the Court was underscored by its comment about a South Carolina opinion: "In the case of *State v. Campbell* . . . the testimony of a deceased witness had been taken before a coroner, but in the absence of the accused, and of course it was held to be inadmissible."[133]

To bolster its argument that the Sixth Amendment was adopted subject to pre-existing exceptions, the Court in dictum discussed dying declarations as another antecedent exception in addition to former testimony, stating: "[F]rom time immemorial they have been treated as competent testimony, and no one would have the hardihood at this day to question their admissibility."[134] The Court analyzed dying declarations solely in

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existed at the time it was adopted, not as reaching out for new guarantees of the rights of the citizen, but as securing to every individual such as he already possessed as a British subject—such as his ancestors had inherited and defended since the days of Magna Carta. Many of its provisions in the nature of a bill of rights are subject to exceptions, recognized long before the adoption of the constitution, and not interfering at all with its spirit. Such exceptions were obviously intended to be respected.

Id.

131. *Id.* at 244. The Court apparently viewed cross-examination and confrontation as two separate requirements.

132. *Id.* at 242 ("The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness."); *see* Dowdell v. United States, 221 U.S. 325, 330 (1911).

133. *Mattox*, 156 U.S. at 241. *Compare Mattox with* cases admitting grand jury testimony discussed *infra* notes 215-18. In light of the aim of protecting the defendant against the creator of the evidence it is also interesting to note that the Court mentioned that many jurisdictions require not just the substance of the witness's testimony, "but the very words of the witness." 156 U.S. at 244. In *Mattox* the Court noted that the oath of the stenographer attesting to the accuracy of his notes supported his report. *Id.*

134. *Id.* at 243.

terms of reliability and need;[135] it did not consider that the exception incorporates a confrontation rationale as it applies only in homicide prosecutions when the defendant is charged with the death of the declarant.[136] Confrontation is excused when the defendant causes the absence of the declarant.[137]

Consequently, with regard to the two pre-existing exceptions the Court mentioned, one is explicable on a waiver notion, and the other requires confrontation at the time the declarant makes a statement. The Court never suggested in *Mattox* that subsequently created evidentiary rules authorizing the receipt of out-of-court statements would satisfy the Confrontation Clause.[138] Indeed, in *Motes v. United States*,[139] the first Justice Harlan found a violation of the right to confrontation when the preliminary examination of a witness whom the defendants had cross-examined was introduced into evidence after the witness disappeared due to the prosecution's negligence. The prosecution argued that such statements were admissible pursuant to the rules of criminal evidence prevailing in the courts of the state in which the defendant committed the crime, but the Court disagreed on the ground that the question "must be determined with reference to the rights of the accused as secured by the Constitution of the United States."[140] Neither *Mattox*

135. *Id.* at 244.

136. On an earlier appeal, the Court assumed in *Mattox* that statements under belief of impending death are admissible only in homicide prosecutions when the defendant is charged with the death of the declarant. *See* Mattox v. United States, 146 U.S. 140, 150 (1892) (stating that the exception applies "on a trial for murder"). While Wigmore insists that the limitation to homicide is a misconstruction that commenced in 1803, in a footnote he quotes an 1802 excerpt from McNally in which the author limits dying declarations in a criminal case to a "trial for murder." McNally does speak of admitting dying declarations in civil cases but these, of course, do not implicate the Confrontation Clause. 3 WIGMORE, *supra* note 62, at 162 n.2; *see also* FED. R. EVID. 804(b)(2) (dying declarations limited to homicide cases and civil cases).

137. *See* Reynolds v. United States, 98 U.S. 145, 158 (1879) ("[I]f a witness is absent by [the defendant's] own wrongful procurement, he cannot complain if competent evidence is admitted to supply the place of that which he has kept away.").

138. *Cf.* 3 WIGMORE, *supra* note 62, § 1397, at 101 ("There were a number of well-established [hearsay exceptions] at the time of the earliest constitutions, and others might be expected to be developed in the future. . . . The rule sanctioned by the Constitution is the hearsay rule as to cross-examination, with all the exceptions that may legitimately be found, developed, or created therein.").

139. 178 U.S. 458 (1900).

140. *Id.* at 474; *see* Kirby v. United States, 174 U.S. 47 (1899). In *Kirby* the defendant was prosecuted for knowing possession of stolen property. *Id.* at 48. A judgment showing the conviction of three persons for stealing the goods was

nor *Motes* so much as mention the word "hearsay."

2. The Influence of Wigmore

Commencing in 1899 with his revision of Greenleaf's Treatise on Evidence,[141] and continuing through the three editions of his own Treatise,[142] Wigmore laid the groundwork for the Supreme Court's present view of confrontation as an evidentiary doctrine. The influence of Wigmore, the effect of his theory on the teaching of evidence, and the acceptance of his theory by subsequent commentators and the courts have been masterfully chronicled and critiqued and will not be repeated here.[143] Wigmore's thesis was stated above: evidence that meets a hearsay exception also passes Confrontation Clause muster because a hearsay exception guarantees that cross-examination is not needed, and the right of confrontation is identical with the right to cross-examination. Consequently the admission of evidence that satisfies a hearsay exception does not impair the Confrontation Clause's truth-seeking mission, which Wigmore assumes is the only function of the Confrontation Clause.

3. The Confrontation Clause Cases: 1965 to Present

If one looks at what the Supreme Court has said since 1965, it appears that Wigmore's vision of the Confrontation Clause has triumphed in large measure. The Court has identified the Confrontation Clause's mission as the ascertainment of truth[144] and has endorsed the similarity, if not equivalency, of Confron-

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introduced into evidence against defendant pursuant to statute for the purpose of proving that the goods were stolen; introduction of record of conviction violated the Confrontation Clause. *Id.* The Court stated that it could not permit proof by record,

> without conceding the power of the legislature, when prescribing the effect as evidence of the records and proceedings of courts, to impair the very substance of a right long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the constitution of the United States and in the constitutions of most if, not of all, the states composing the Union.

Id. at 56.

141. SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE (1899).

142. The three editions were published in 1904, 1923, and 1939. See WIGMORE, *supra* note 62.

143. *See* Gutman, *supra* note 16, at 327-43; *see also* Graham, *supra* note 59, at 104; Larkin, *supra* note 22, at 68-70.

144. Dutton v. Evans, 400 U.S. 74, 88-90 (1970) (opinion of Stewart, J.).

tation Clause and hearsay values.[145] Although it has not accepted Wigmore's view that newly created hearsay exceptions will automatically satisfy the constitutional provision,[146] it has rejected any interpretation of the Clause that would treat confrontation as an absolute right subject only to the exceptions recognized at common law prior to the adoption of the Bill of Rights.[147]

Interestingly, since the Court decides which cases it wishes to hear, its Confrontation Clause docket has dealt almost exclusively with out-of-court statements that the government or an agent working for the prosecution elicited, rather than statements made to non-officials.[148] This suggests that the Court is aware of the special dangers posed by the government's participation in the creation of evidence. In its opinions, however, the Court has only tangentially recognized the prosecution's special role in gathering the evidence in question, even though, as will be discussed below, some of the opinions reach results and contain language compatible with a prosecutorial restraint model.[149]

The discussion that follows considers the extent to which the Court has been sensitive to the potential for inquisitorial questioning in three categories of cases: first, cases in which the statements do not satisfy the Court's test for former testimony, and no other exception applies; second, cases in which the statement was not subjected to contemporaneous cross-examination and confrontation, but the declarant is produced; and third, cases in which the statement satisfies a hearsay exception, and the declarant is not produced. It then evaluates the standards the Court has set forth and concludes that they fail

145. Idaho v. Wright, 110 S. Ct. 3139, 3146 (1990).

146. *Id.* at 3148 ("[W]ere we to agree that the admission of hearsay statements under the residual exception automatically passed Confrontation Clause scrutiny, virtually every codified hearsay exception would assume constitutional stature, a step this Court has repeatedly declined to take.").

147. *See* Bourjailly v. United States, 483 U.S. 171, 182 (1987); Dutton v. Evans, 400 U.S. 74, 94-96 (Harlan, J. concurring).

148. *Cf. Bourjaily*, 483 U.S. at 173-74 (statement made to informant working for the FBI, discussed *infra* notes 159-61 and accompanying text). The exceptions are Dutton v. Evans, 400 U.S. at 77 (statement made to a fellow prisoner) and United States v. Inadi, 475 U.S. 387, 389 (1986) (statement made to co-conspirator). In Illinois v. White, 112 S. Ct. 736 (1992), five different out-of-court statements were admitted, one of which was made to a police officer. *Id.* at 739.

149. *See infra* part III.

to restrain prosecutors adequately in the second and third categories of cases.

a. *No Hearsay Exception*

Not until after 1970 did the Court begin a vigorous exploration of the relationship between statements that satisfy hearsay exceptions and the Confrontation Clause. Until then, the Court's confrontation cases involved former testimony, or statements that did not satisfy any hearsay exception. In these cases the Court found a Sixth Amendment violation when a government attorney obtained the statement in issue at a hearing or as a consequence of government interrogation, unless an opportunity for confrontation and cross-examination existed either at the time the statement was given or at trial.[150] Furthermore, the Court extended the notion of prosecutorial misbehavior or negligence to situations in which the prosecution did not make an adequate effort to produce the declarant.[151]

The result in this line of cases is consistent with a rationale of requiring the government to present its case in public. The prosecutor cannot rely on secretly created evidence to make out a case at trial even if the declarant becomes unavailable. Statements the prosecutor obtained are admissible if the declarant becomes unavailable only when the prosecutor is not responsible for the declarant's unavailability and the statement was previously subject to cross-examination, a provision that ensures an opportunity to explore the prosecutor's role in bringing about the statement.

b. *Declarant Produced*

The second category consists of cases in which the person who previously made a statement to the government is present

150. Cases in which the statements do not satisfy the former testimony exception and cases implicating Bruton v. United States, 391 U.S. 123 (1968), fall into this category: Douglas v. Alabama, 380 U.S. 415, 416-17 (1965) (accomplice's written confession made during interrogation); Pointer v. Texas, 380 U.S. 400, 401 (1965) (testimony of witness given at preliminary hearing at which defendant was unrepresented by counsel); Brookhart v. Janis, 384 U.S. 1, 2 (1965) (custodial confession of accomplice).

151. *See, e.g.*, Barber v. Page, 390 U.S. 719, 724-25 (1968); *see also* Ohio v. Roberts, 448 U.S. 56, 75-77, 79-80 (1980) (majority and dissent disagreed as to prosecution's effort); Mancusi v. Stubbs, 408 U.S. 204, 210-12 (1972) (state was powerless to compel declarant's attendance); *cf.* Parker v. Gladden, 385 U.S. 363, 363-64 (1966) (per curiam) (bailiff who made comments to sequestered jury about defendant's guilt in effect became witness against defendant in violation of defendant's confrontation right).

and testifying at trial, and the prior statement is introduced as substantive evidence.[152] In *United States v. Owens*,[153] a five-to-four majority of the Court held that constitutional requirements are satisfied whenever the hearsay declarant is produced at trial and subject to unrestricted cross-examination. In *Owens*, the declarant, Foster, had suffered a severe head injury as the result of an attack the defendant allegedly committed. While Foster was in the hospital, an FBI agent interviewed him and reported that Foster identified the defendant as his assailant. Although Foster later remembered stating that Owens had assaulted him, he did not remember anything about the attack and did not remember any of his hospital visitors—including his wife who came daily. He remembered seeing only the agent to whom he made the identification.[154]

Neither the majority nor the dissent, which disagreed about the effectiveness of cross-examination under these circumstances, considered whether Foster's statement should have been excluded to deter prosecutorial overreaching. Some safeguard should be required when a government agent deliberately induces a statement from a witness known to be suffering from a disability, such as a severe head injury. Although the government produced the declarant, he was incapable of reconstructing the interview that led him to make the identification.[155] The defendant was, of course, at liberty to ask the agent about the interrogation, and the jury could have decided to disbelieve him. But the problem is not just that of ascertaining the truth; the questioning of incapacitated witnesses entails the same kind of dangers that underlie the *Massiah* and *Wade* line of cases discussed above and should be handled with a prophylactic rule responsive to the danger.

c. *Hearsay Exception: Declarant Not Produced*

The third category, most reflective of Wigmore's influence,

152. In California v. Green, 399 U.S. 149 (1970), the Court reserved decision on whether a declarant's lack of memory about the events detailed in the statement might so affect the defendant's ability to cross-examine as to amount to a denial of confrontation. *Id.* at 168-70. Although the *Green* Court characterized Mattox v. United States, 156 U.S. 237 (1895), as preventing depositions or *ex parte* affidavits, the Court still viewed the rationale for confrontation solely in terms of enabling the jury to ascertain the truth. *Id.* at 157-58.

153. 484 U.S. 554 (1988).

154. *Id.* at 556.

155. Safeguards with regard to the questioning of children are discussed *infra* notes 219-25 and accompanying text.

consists of cases in which a court admits the evidence in question pursuant to a hearsay exception, and the declarant did not testify at trial. In some of these cases the witness was unavailable; in others the witness was not. To date, the Supreme Court has treated statements made to prosecutors or their agents pursuant to three different hearsay exceptions: co-conspirators' statements, declarations against interest, and the residual hearsay exception.

(i). Co-conspirators Statements

The text of the applicable rule does not appear to implicate prosecutors at all.[156] In order for a co-conspirator's statement to be admitted, "[t]here must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made 'in the course and in furtherance of the conspiracy.' "[157] According to the Supreme Court, fulfillment of the evidentiary rule simultaneously satisfies the constitutional test, so that a nontestifying co-conspirator's statement is admissible whether or not the declarant is available as a witness.[158]

In *Bourjaily v. United States*,[159] none of the justices in the majority or in the dissent considered it significant that the statement was made in a telephone conversation with an informant working for the FBI. The Court ignored the issue of whether a special analysis is required when statements are obtained by a governmental agent or an informant working for an agent. In an earlier case, the Court had said that when a conspirator speaks to a fellow conspirator, the resulting statement may indeed have significant evidentiary value because "[c]onspirators are likely to speak differently when talking to each other in furtherance of their illegal aims than when testifying on the witness stand."[160] When a government agent elicits the statement with a possible agenda as to the answers he wants, the spontaneity of the responses is much less convincing. In some instances, the agent's questions may be deliberately framed to encourage certain replies. The failure to produce the

156. The Federal Rules of Evidence provide: "A statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." FED. R. EVID. 801(d)(2).

157. Bourjaily v. United States, 483 U.S. 171, 175 (1987).

158. *Id.* at 182; United States v. Inadi, 475 U.S. 387, 398-400 (1985).

159. 483 U.S. 171 (1987).

160. *Inadi*, 475 U.S. at 395.

declarant means that secret questioning is immunized from jury scrutiny.

If an object of confrontation is to require the prosecution to make visible the manner in which it creates evidence, then the Court's current interpretation of the co-conspirators' exception is totally insensitive to this goal. Although the Court in *Bourjaily* justified the constitutional status of the exception on the basis of its long, firmly rooted existence, the declarants in the cases the Court cited were not making statements to agents of the prosecution.[161] The contrary is true in the majority of the cases that currently reach the federal appellate courts. It is possible to determine to whom the declarant was speaking in forty-two officially reported appellate opinions that in 1990 addressed co-conspirators' statements.[162] In seventeen of these cases the declarant was speaking to an undercover agent[163] and

161. The Court cited the following cases in *Bourjaily* in support of the conclusion that co-conspirators' statements are firmly rooted: United States v. Nixon, 418 U.S. 683 (1974) (tapes at issue contained mostly conversations in which at least one of the co-conspirators participated); Glasser v. United States, 315 U.S. 60 (1942) (testimony of inmates regarding statements made by a codefendant concerning defendant's involvement in a murder allowed); Delaney v. United States, 263 U.S. 586 (1924) (co-conspirator's testimony regarding details relayed by a conspirator who was dead at the time of trial allowed); United States v. Gooding, 25 U.S. (12 Wheat) 460 (1827) (Court allowed testimony by ship captain to whom ship's master had offered position regarding the ownership of a slave ship). *Bourjailly*, 483 U.S. at 182-83.

162. By cases dealing with co-conspirators statements, I mean all cases in which issues arising under Federal Rules of Evidence 801(d)(2)(E) were raised on appeal. In three cases, it was not possible to tell to whom the declarant was speaking: United States v. Herrero, 893 F.2d 1512 (7th Cir. 1990); United States v. Meggers, 912 F.2d 246 (8th Cir. 1990); United States v. Jones, 913 F.2d 1552 (11th Cir. 1990).

163. United States v. Thomas, 896 F.2d 589 (D.C. Cir. 1990); United States v. McDowell, 918 F.2d 1004 (1st Cir. 1990); United States v. Gomez-Pabon, 911 F.2d 847 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 801 (1991); United States v. Angiulo, 897 F.2d 1169 (1st Cir.), *cert. denied*, 111 S. Ct. 130 (1990); United States v. Bolick, 917 F.2d 135 (4th Cir. 1990); United States v. Schmick, 904 F.2d 936 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 782 (1991); United States v. Pallais, 921 F.2d 684 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 134 (1991); United States v. Romo, 914 F.2d 889 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1078 (1991); United States v. Felton, 908 F.2d 186 (7th Cir. 1990); United States v. Arvanitis, 902 F.2d 489 (7th Cir. 1990); United States v. Briscoe, 896 F.2d 1476 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 173 (1991); United States v. Fortier, 911 F.2d 100 (8th Cir. 1990); United States v. Mayes, 917 F.2d 457 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1087 (1991); United States v. Byrom, 910 F.2d 725 (11th Cir. 1990); United States v. Perez-Garcia, 904 F.2d 1534 (11th Cir. 1990); United States v. Joshi, 896 F.2d 1303 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 523 (1991); *cf.* United States v. Cruz, 910 F.2d 1072 (3d Cir. 1990) (undercover agent overheard declarant), *cert. denied*, 111 S. Ct. 709 (1991).

in another seven cases the declarant was speaking to an informant.[164] In only sixteen cases was the declarant speaking to a true co-conspirator.[165]

The overwhelming majority of the 1990 appellate cases involving the conspirator's exception result from narcotics charges.[166] Because the Supreme Court's Confrontation Clause

164. United States v. Long, 917 F.2d 691 (2d Cir. 1990); United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2011 (1991); United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir.), *cert. denied*, 111 S. Ct. 173 (1990); United States v. Hoelscher, 914 F.2d 1527 (8th Cir. 1990) *cert. denied*, 111 S. Ct. 971 (1991) and *cert. denied*, 111 S. Ct. 2240 (1991); United States v. Khoury, 901 F.2d 948 (11th Cir. 1990); United States v. Smith, 918 F.2d 1551 (11th Cir. 1990); United States v. Vasquez, 903 F.2d 1400 (11th Cir. 1990) (per curiam).

165. United States v. Rocha, 916 F.2d 219 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2057 (1991); United States v. Moody, 903 F.2d 321 (5th Cir. 1990); United States v. Todd, 920 F.2d 399 (6th Cir. 1990); United States v. Reynolds, 919 F.2d 435 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1402 (1991); United States v. Elizondo, 920 F.2d 1308 (7th Cir. 1990); United States v. Nichols, 910 F.2d 419 (7th Cir. 1990); United States v. Smith, 909 F.2d 1164 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 691 (1991); United States v. Shyres, 898 F.2d 647 (8th Cir.), *cert. denied*, 111 S. Ct. 69 (1990); United States v. Mayberry, 896 F.2d 1117 (8th Cir. 1990); United States v. Drew, 894 F.2d 965 (8th Cir.), *cert. denied*, 110 S. Ct. 1830 (1990); United States v. Garcia, 893 F.2d 188 (8th Cir. 1990); United States v. Torres, 908 F.2d 1417 (9th Cir.), *cert. denied*, 111 S. Ct. 272 and *cert. denied*, 111 S. Ct. 366 (1990); *In re* Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 906 F.2d 432 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2274 (1991); United States v. Johnson, 911 F.2d 1394 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 761 (1991); United States v. Smith, 918 F.2d 1501 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 151 (1991) and *cert. denied*, 112 S. Ct. 253 (1991); United States v. Allison, 908 F.2d 1531 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1681 (1991).

166. In 34 out of the 47 opinions, the statements were made in drug prosecutions: United States v. Thomas, 896 F.2d 589 (D.C. Cir. 1990) (per curiam); United States v. McDowell, 918 F.2d 1004 (1st Cir. 1990); United States v. Gomez-Pabon, 911 F.2d 847 (1st Cir. 1990), *cert. denied*, 111 S. Ct. 801 (1991); United States v. Pungitore, 910 F.2d 1084 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 2011 (1991); United States v. Cruz, 910 F.2d 1072 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 709 (1991); United States v. Rocha, 916 F.2d 219 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 2057 (1991); United States v. Todd, 920 F.2d 399 (6th Cir. 1990); United States v. Pallais, 921 F.2d 684 (7th Cir. 1990), *cert. denied*, 112 S. Ct. 134 (1991); United States v. Elizondo, 920 F.2d 1308 (7th Cir. 1990); United States v. Romo, 914 F.2d 889 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 1078 (1991); United States v. Nichols, 910 F.2d 419 (7th Cir. 1990); United States v. Felton, 908 F.2d 186 (7th Cir. 1990); United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir.), *cert. denied*, 111 S. Ct. 173 (1990); United States v. Sophie, 900 F.2d 1064 (7th Cir.), *cert. denied*, 111 S. Ct. 124 (1990); United States v. Briscoe, 896 F.2d 1476 (7th Cir.), *cert. denied*, 111 S. Ct. 173 (1990); United States v. Hoelscher, 914 F.2d 1527 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 971 and *cert. denied*, 111 S. Ct. 2240 (1991); United States v. Meggers, 912 F.2d 246 (8th Cir. 1990); United States v. Fortier, 911 F.2d 100 (8th Cir. 1990); United States v. Smith, 909 F.2d 1164 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 691 (1991); United States v.

jurisprudence awards constitutionality to every co-conspirator's statement that satisfies the evidentiary test,[167] the process by which the prosecution gathers evidence in these cases may remain shrouded in secrecy. Obviously, effective crime enforcement requires some clandestine governmental activity, but the law has recognized, even apart from constitutional concerns, that there are limits on what the prosecution may do in the name of efficiency or avoiding harm to its agents. For instance, if the prosecution oversteps certain bounds, the defendant may be able to establish entrapment.[168] If a secret informant's testimony is necessary to a fair determination of defendant's guilt or innocence, the government has to choose between revealing the informant's identity or having the case dismissed.[169]

The inability to obtain a total, two-sided picture of the process by which governmental agents have obtained incriminating statements against targeted individuals is somewhat philosophically at odds with these doctrines. Furthermore, the more jurors are kept in the dark about the government's role in shaping the evidence, the less able they are to exercise their power to acquit in extreme cases because of a distaste for the methods used by law-enforcement authorities. Even if jury nullification is not recognized in theory, in practice the jury's ability to acquit may play a role in curtailing undesirable practices.[170] Recent narcotics prosecutions in which jurors refused

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O'Meara, 895 F.2d 1216 (8th Cir.), *cert. denied*, 111 S. Ct. 352 (1990); United States v. Nevils, 897 F.2d 300 (8th Cir.), *cert. denied*, 111 S. Ct. 125 (1990); United States v. Drew, 894 F.2d 965 (8th Cir.), *cert. denied*, 110 S. Ct. 1830 (1990); United States v. Torres, 908 F.2d 1417 (9th Cir.), *cert. denied*, 111 S. Ct. 272 and *cert. denied*, 111 S. Ct. 366 (1990); United States v. Smith, 893 F.2d 1573 (9th Cir. 1990); United States v. Mayes, 917 F.2d 457 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1087 (1991); United States v. Johnson, 911 F.2d 1394 (10th Cir.), *cert. denied*, 111 S. Ct. 761 (1990); United States v. Smith, 918 F.2d 1551 (11th Cir. 1990); United States v. Smith, 918 F.2d 1501 (11th Cir.), *cert. denied*, 112 S. Ct. 151 and *cert. denied*, 112 S. Ct. 253 (1990); United States v. Jones, 913 F.2d 1552 (11th Cir. 1990); United States v. Allison, 908 F.2d 1531 (11th Cir. 1990), *cert. denied*, 111 S. Ct. 1681 (1991); United States v. Byrom, 910 F.2d 725 (11th Cir. 1990); United States v. Perez-Garcia, 904 F.2d 1534 (11th Cir. 1990); United States v. Khoury, 901 F.2d 948 (11th Cir. 1990).

167. *See supra* text accompanying note 158.

168. *See, e.g.*, Mathews v. United States, 485 U.S. 58, 62 (1988) (permitting defendant to raise an entrapment defense even if he denies commission of crime provided "there is sufficient evidence from which a reasonable jury could find entrapment.").

169. Roviaro v. United States, 353 U.S. 53, 60-61 (1957).

170. *See* Katherine Bishop, *Diverse Group Wants Juries to Follow Natural Law*, N.Y. TIMES, Sept. 26, 1991, at B16 (discussing growth of movement aimed

to convict[171] suggest that the jury's access to information about the prosecution affects the right to trial by jury, and that an interpretation of the Confrontation Clause that makes more information accessible to the jury may consequently have an impact on how the jury functions.

(ii). Statements Against Interest

The statement against interest hearsay exception is similarly silent about statements made to the government.[172] With regard to this type of hearsay, however, the Court has demonstrated some interest in the prosecution's role in securing evidence. In *Lee v. Illinois*,[173] the trial court had "expressly relied on portions of the codefendant's confession, obtained by police at time of arrest, as substantive evidence against the petitioner."[174] In a five-to-four decision, both the majority and dissent assumed that the statement could be classified as a statement against penal interest.[175] The majority, however, treated the evidentiary classification of the statement as inconsequential. It characterized the hearsay exception as defining "too large a class for meaningful Confrontation Clause analysis . . . [and] decide[d] this case as involving a confession by an accomplice which incriminates a criminal defendant."[176] In reaching this conclusion, the five justices rejected Wigmore's hypothesis that statements that pass the evidentiary hurdle of

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at allowing juries to nullify bad laws). The question of whether there should be jury nullification is certainly beyond the scope of this Article.

171. *Id.* at B16. Bishop discusses jury rebellion in recent cases such as the prosecutions of automobile manufacturer John DeLorean and Mayor Marion Barry of Washington, D.C. because of distaste for the prosecution's undercover tactics. *Id.*

172. FED. R. EVID. 804(b)(3). It admits "[a] statement which . . . at the time of its making . . . so far tended to subject the declarant to . . . criminal liability, . . . that a reasonable person in the declarant's position would not have made the statement unless believing it to be true." *Id.*

173. 476 U.S. 530 (1986).

174. *Id.* at 531.

175. The codefendant's confession was not formerly offered pursuant to a hearsay exception at trial. The two defendants were tried together in a bench trial, and the court indicated that it would consider only the evidence proper to each defendant with regard to that defendant. *Id.* at 536. Before the Supreme Court, the State of Illinois contended that the hearsay involved was a declaration against penal interest. *Id.* at 544 n.5. The dissent found that the statements "were thoroughly and unambiguously adverse to [the declarant's] penal interest" and concluded that they meet the requirements of the Confrontation Clause because declarations against penal interest are firmly rooted hearsay exceptions. *Id.* at 551 (Blackmun, J., dissenting).

176. *Id.* at 544 n.5.

the hearsay rule will automatically satisfy the Confrontation Clause.[177]

The majority, nevertheless, in finding a constitutional violation, relied on an evidentiary concern, the fear that "the admission of this type of evidence will distort the truthfinding process."[178] There are glimmers in the majority opinion, however, that support a construction of the Confrontation Clause as requiring more than accurate determinations. Before launching into its demonstration of the "inherently unreliable" features of a codefendant's confession inculpating the accused,[179] the majority considered how the constitutional provision serves symbolic goals:

> On one level, the right to confront and cross-examine adverse witnesses contributes to the establishment of a system of criminal justice in which the perception as well as the reality of fairness prevails. To foster such a system, the Constitution provides certain safeguards to promote to the greatest possible degree society's interest in having the accused and accuser engage in an open and even contest in a public trial. The Confrontation Clause advances these goals by ensuring that convictions will not be based on the charges of unseen and unknown—and hence unchallengeable—individuals.[180]

Although the majority's opinion concentrated almost exclusively on the declarant and his motive to falsify, the majority also noted that "[t]he unsworn statement was given in response to the questions of police, who, having already interrogated Lee, no doubt knew what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel, or its equivalent."[181]

Taken together, the majority's recognition that the Clause complements the Sixth Amendment right to a public trial by jury and its acknowledgment that the prosecutor may have an agenda before questioning begins provide support for the thesis being put forward in this Article. Inculpatory confessions elicited through a custodial interrogation closely resemble the

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177. *Id.* at 543.

178. *Id.* at 544. The majority explained:

> The true danger inherent in this type of hearsay is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another.

Id. at 545.

179. *Id.* at 546.

180. *Id.* at 540.

181. *Id.* at 544.

kinds of statements that historically led to a demand for confrontation. Public scrutiny of the declarant is necessary not only to probe his motives for having made the statement inculpating the accused, but also to explore the extent to which the prosecution's expectations may have shaped the statement's wording and scope, and to check whether the prosecution brought pressures or promises to bear. The knowledge that the prosecution's behavior will be explored at trial may also deter suggestive and leading inquisitorial practices.

(iii) Residual Hearsay Exception

In *Idaho v. Wright*,[182] the state trial court had admitted statements a two-and-a-half-year-old child, Kathy, made to a physician, Dr. Jambura, in which she accused her father of sexual abuse. The Supreme Court of Idaho found that the admission of the statements, pursuant to the state's residual hearsay exception,[183] violated the defendant's rights under the Confrontation Clause.[184] The United States Supreme Court, in another five-to-four opinion, agreed.

Because the child's statements did not satisfy a firmly rooted hearsay exception, all members of the Court agreed that they were presumptively unreliable and inadmissible absent a

182. 110 S. Ct. 3139 (1990).

183. The statements were admitted pursuant to an Idaho rule which is identical to Federal Rules of Evidence 803(24) and provides:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: Other exceptions. A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet it, [the proponent's] intention to offer the statement and the particulars of it, including the name and address of the declarant.

IDAHO R. EVID. 803(24) (cited at 110 S. Ct. at 3144-45).

184. In the originial trial both the mother and father were defendants. 110 S. Ct. at 3143. In separate appeals, the Idaho Supreme Court affirmed the conviction of the father, State v. Giles, 772 P.2d 191 (Idaho 1989), but reversed the conviction of the mother, State v. Wright, 775 P.2d 1224 (Idaho 1989). The basis of the distinction was that the father did not raise the Confrontation Clause issue on appeal. 110 S. Ct. at 3145.

showing of "particularized guarantees of trustworthiness."[185] After viewing the totality of the circumstances surrounding the questioning of Kathy by Dr. Jambura, the majority found that the Supreme Court of Idaho "properly focused on the suggestive manner" in which the doctor conducted the interview.[186] According to the Idaho court, Dr. Jambura asked blatantly leading questions in the interrogation and began the interview with a preconceived notion of what Kathy should disclose.[187] Consequently, the Idaho Supreme Court majority detected "no special reason for supposing that the incriminating statements were particularly trustworthy."[188]

In its discussion, the majority did not explicitly accord any significance to the role the prosecution played in obtaining Kathy's statements. In fact, Kathy made the statements to Dr. Jambura after she had been in police custody overnight. Police selected the physician and the doctor knew that officers suspected the child had been sexually abused by her father.[189] The doctor therefore prepared four questions for Kathy's interview that focused exclusively on the child's activities with her father. In using leading questions to get for the police "what they were looking for,"[190] Dr. Jambura functioned as an agent of the prosecution.[191]

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185. 110 S. Ct. at 3146-47; *see also id.* at 3153 (Kennedy, J., dissenting).

186. *Id.* at 3152.

187. *Id.* at 3145.

188. *Id.* at 3152.

189. The previous day the police had sent Kathy's older half-sister to Dr. Jambura for an examination after she complained that she was being sexually abused by her mother and her mother's boyfriend, Kathy's father. When Dr. Jambura's examination of Kathy's sister revealed evidence of sexual abuse, the police took Kathy into custody. *Id.* at 3143.

190. See discussion of Lee v. Illinois, 476 U.S. 530 (1986), in text accompanying *supra* note 181.

191. In his commentary to this Article, Professor Jonakait objects that the record in *Idaho v. Wright* does not support the conclusion that Dr. Jambura was acting as an agent of the prosecution. Jonakait, *supra* note 29, at 619. To my surprise, I found support for my position in an unexpected quarter. The Solicitor General filed a brief in White v. Illinois, 112 S. Ct. 736 (1992), in which he argued that only statements taken by the government with a view to legal proceedings are subject to Confrontation Clause analysis because only then are the declarants in the position of "witnesses against" the defendant. According to this analysis, with which I do not agree, *see* text accompanying *supra* notes 28-29, statements such as the excited utterances in the *White* case do not have to satisfy the Confrontation Clause. The Solicitor General conceded, however, that the child's statements in *Idaho v. Wright* are statements to which the Confrontation Clause applies:

> [T]he questioning in that case occurred after the declarant had been taken into custody by the police, and the state court's characterization

Although the majority did not comment on Dr. Jambura's connection with the police, the opinion suggests that the prosecution's role in creating evidence may have had an unarticulated impact. The majority and the dissent disagreed principally about the evidence a court may consider in determining whether "particularized guarantees of trustworthiness" are shown. The dissent argued strongly that other evidence that confirmed the truth of the statement, such as physical evidence of sexual abuse, should be usable to corroborate the reliability of the statement.[192] According to the majority, however, the relevant circumstances that may be considered "include only those that surround the making of the statement and that render the declarant particularly worthy of belief."[193]

Limiting evidence to the truthfulness of the declarant rather than the truth of the statement in question may strike many besides the dissenters as contrary to the common sense we use in evaluating hearsay in everyday life. It may also seem somewhat at odds with the goal of more accurate fact determinations.[194] The majority's test makes perfect sense, however, in terms of restraining the prosecution. The result is that prosecutors cannot bolster weak evidence that would be insufficient to support a verdict by leaning on a witness to produce a statement that a court would then find sufficiently trustworthy to satisfy the Confrontation Clause because it is corroborated by the original evidence. Such an opportunity to bootstrap, which the majority rejects, would give the prosecution an incentive to prop up unsubstantial evidence with hearsay statements ob-

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> of the questioning suggest that it was designed to develop evidence in a criminal case. . . . The questioning therefore may be regarded as functionally equivalent to other forms of official interrogation that result in statements by a "witness."

Brief for the United States as Amicus Curiae Supporting Respondent at 28 n.18, White v. Illinois, 112 S. Ct. 736 (1992) (citations omitted). Justice Thomas's concurring opinion in *White* proposes a considerably narrower formula for identifying extrajudicial statements subject to the Confrontation Clause. *See supra* notes 25-30. Kathy's statements in response to Dr. Jambura would presumably not meet Justice Thomas's definition.

192. 110 S. Ct. at 3156 (Kennedy, J., dissenting).

193. *Id.* at 3148.

194. *See* Ronald J. Allen, *Foreword—Evidence, Inference, Rules and Judgment in Constitutional Adjudication: The Intriguing Case of* Walton v. Arizona, 81 S. CT. REV. 727, 753-55 (1991). Allen points out the weakness in the *Wright* Court's analysis: "One important determinant of reliability is the manner in which any particular testimony meshes with other testimony, as well as with what the decision maker believes to be reasonable. These are not matters that can be limited to the circumstances surrounding the making of the statement." *Id.* at 754.

tained through inquisitorial questioning. The majority's opinion, though couched in terms of reliability and trustworthiness, restrains a prosecutor from attempting to shape the evidence during an interview controlled by an interrogator who induces a statement from a declarant who will be conveniently absent at trial.

After looking at these recent Confrontation Clause cases, it appears that the objective of limiting the prosecution and exposing its workings to the jury may have affected decisions even while the Court was acknowledging its allegiance to accuracy in fact-finding. At best, however, the Court's recognition of a goal of limiting the government is erratic and is completely ignored in the case of the co-conspirator's exception. Furthermore, the majorities that crafted opinions in *Lee* and *Wright*, which are supportive of a prosecutorial restraint rationale, include now retired Justices Brennan and Marshall. Given the crime-control model of criminal justice that increasingly has found favor with conservative justices, it is unlikely that recent appointees to the Court will be interested in a theory that seeks to make more public the exercise of the prosecutorial function. Nevertheless, the final section of this Article will attempt to demonstrate why such an approach is needed. Since all but three state constitutions contain some version of a confrontation clause,[195] perhaps state courts may evince more interest in construing the clauses in their own constitutions as a limitation on the government's power to create and use evidence.

III. SUGGESTIONS FOR CHANGE

A. THE TRUSTWORTHINESS RATIONALE'S FAILURE TO PROVIDE MEANINGFUL PROTECTION

Others have so ably demonstrated the illusory protection afforded a defendant by the evidentiary version of confrontation[196] that there is little need for further comment. The problem has been exacerbated by the growing erosion of the hearsay rule. If hearsay statements are being judicially ana-

195. *Cf.* Eileen A. Scallen, *Constitutional Dimensions of Hearsay Reform: Toward a Three Dimensional Confrontation Clause*, 76 MINN. L. REV. 623, 640 n.71 (1992) (citing LEGISLATIVE DRAFTING RESEARCH FUND, CONSTITUTIONS OF THE UNITED STATES, NATIONAL AND STATES (1991) (collecting State Constitutional provisions).

196. Immwinkelreid, *supra* note 2, at 522-38.

lyzed to by-pass notions of trustworthiness[197] and confrontation is measured by the parameters of the hearsay rule, then neither the evidentiary rule nor the constitutional doctrine will safeguard the accused.

Furthermore, the accused lacks protection even when satisfaction of the hearsay requirement does not automatically satisfy the Confrontation Clause, as is the case with hearsay admitted pursuant to a residual exception.[198] Indicia of reliability are "easy to come by."[199] Indeed, one part of the majority opinion in *Idaho v. Wright*[200] reads like a handbook instructing prosecutors how to offer a child's hearsay statement with requisite "particularized guarantees of trustworthiness." According to the Court, the following factors bear on whether a statement by a child witness in child sexual abuse cases is reliable: spontaneity and constant repetition; mental state of the declarant; use of terminology unexpected of a child of similar age; lack of motive to fabricate.[201] Exactly what do the factors on this list prove? For instance, use of terminology unexpected of a child of similar age does not establish the trustworthiness of the child in question unless there is a basis for ascertaining that this particular child would not have heard these words elsewhere.[202]

197. Eleanor Swift, *Has the Hearsay Rule Been Abolished De Facto by Judicial Decision?*, 76 MINN. L. REV. 473 (1992).

198. Of course legislatures may react by creating new class exceptions that over time may be viewed as firmly rooted, and ergo, constitutional. Courts may also reclassify statements as fitting into a class exception; for example, statements by an alleged victim of child sexual abuse to a physician identifying the defendant have been admitted by some courts pursuant to Federal Rules of Evidence 803(t). *See, e.g.*, United States v. Provost, 875 F.2d 172, 177 (8th Cir.), *cert. denied*, 493 U.S. 859 (1989); United States v. Renville, 779 F.2d 430, 437 (8th Cir. 1985). Whether the Supreme Court will consider a pre-codification, but reformulated, exception as firmly rooted remains to be seen. The same issue arises with regard to declarations against interest, as declarations against penal interest had not been admissible prior to their inclusion in the Federal Rules of Evidence. *See* United States v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991) (holding that statements that satisfy Rule 804(b)(3) of the Federal Rules of Evidence are firmly rooted hearsay exceptions).

199. Dutton v. Evans, 400 U.S. 74, 110 (1970) (Marshall, J., dissenting).

200. 110 S. Ct. 3139 (1990).

201. *Id.* at 3150.

202. A presumption that young children would not know the facts of life unless they were sexually abused seems suspect in an era when 70% of all American households own VCRs, video stores have large sections devoted to "adult" movies, a market exists in home-made pornographic films, N.Y. TIMES, Mar. 22, 1991 at A14, children enter day care at very young ages, and baby sitters are often relied on for child care. Under these circumstances, even a parent may not be aware of what a child has seen and heard.

Judges are unlikely to spend time on evidentiary hearings aimed at establishing the parameters of the particular child's knowledge.[203] Rather, experience with the co-conspirators exception suggests that judges will admit a statement if the prosecutor recites the appropriate formula. Although a statement satisfies the co-conspirators exception only if made "in furtherance" of the conspiracy, the cases indicate that courts may fail to consider whether the statement really tended to advance the objectives of the conspiracy. Instead, the provision is often construed mechanically to authorize admission whenever the statement can be characterized as falling into certain categories the appellate courts have developed.[204]

B. Applying a Prosecutorial Restraint Model

Under a prosecutorial restraint model, statements elicited by the prosecution and admissible pursuant to hearsay exceptions would have to be reanalyzed to determine conformity with the Confrontation Clause. Suggestions for how this inquiry should be conducted follow.

1. Former Testimony

The current rules regarding the admission of prior testimony have remained virtually the same since the original Supreme Court opinions construing the Confrontation Clause.[205] They are consistent with a prosecutorial restraint rationale.[206]

2. Declarant Produced

Ordinarily the objectives served by the Confrontation

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203. In addition, such a hearing might be fruitless. Kathy, the two-and-one-half-year-old child in *Wright*, was excused from testifying because of her inability to answer simple questions. When asked how old she was, for example, she first responded, "Kathy Wright" and then stated she was six years old. Joint Appendix at 33-34, Idaho v. Wright, 110 S. Ct. 3139 (1990).

204. For a summary of some of the categories frequently utilized by the courts, see United States v. Maldonado-Rivera, 922 F.2d 934, 958-59 (2d Cir. 1990) ("[S]tatements between coconspirators that may be found to be in furtherance of the conspiracy include statements that provide reassurance, or seek to induce a coconspirator's assistance, or serve to foster trust and cohesiveness, or inform each other as to the progress or status of the conspiracy."), *cert. denied*, 111 S. Ct. 2811 (1991).

205. *See supra* part II.B.1.

206. The efficacy of the restraint will be lessened to the extent that the burden on the government to make a good faith effort to produce the declarant is relaxed.

Clause will be satisfied if the declarant testifies at trial and his out-of-court statement is introduced into evidence. If, however, the declarant was known to be particularly vulnerable[207] when the prosecution deliberately obtained his statement, then the prosecution should be required to produce a tape of the interview unless the statement was obtained at a hearing at which a transcript was made.[208] This requirement will not only deter prosecutors from leaning on the witness, but will also enable the jury to reconstruct the interview. In the absence of a tape, the witness relating the statement rather than the jury is likely to control the outcome.[209]

3. Co-conspirator's Statements

Statements deliberately elicited by an agent of the prosecution should not automatically satisfy the Confrontation Clause. When the interrogator is relying on leading questions, or is otherwise making suggestions with a preconceived notion of the evidence he wishes to obtain, the declarant ought to be produced. On the other hand, if the agent or informant is playing a passive, non-directive role, the statement does not resemble the product of inquisitorial questioning. Courts should have discretion to determine which mode of interrogation the agent employed. To do so, of course, they have to examine the statement in the context in which it arose. Frequently, this will not be a problem because the government regularly wires agents and informants.[210] Co-conspirators' statements made to an

207. A mentally unstable person, or a child, or someone suffering from a head injury as in United States v. Owens, 484 U.S. 554 (1988), are examples of vulnerability. *See supra* notes 152-55 and accompanying text.

208. In the federal courts a transcript will always exist if the statement is being offered as a prior inconsistent statement. *See* FED. R. EVID. 801(d)(1)(A). This is not so in some states, such as California. *See* California v. Green, 399 U.S. 149, 149 (1969).

209. *See supra* notes 119-20 and accompanying text (discussion of United States v. Wade, 388 U.S. 218 (1967)).

210. In the 34 drug prosecutions that resulted in reported appellate review in 1990, tapes of the co-conspirators' statements were produced in half. *See* United States v. McDowell, 918 F.2d 1004 (1st Cir. 1990); United States v. Felton, 908 F.2d 186 (7th Cir. 1990); United States v. Martinez de Ortiz, 907 F.2d 629 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 684 (1991); United States v. Sophie, 900 F.2d 1064 (7th Cir.), *cert. denied*, 110 S. Ct. 124 (1990); United States v. Briscoe, 896 F.2d 1476 (7th Cir.), *cert. denied*, 111 S. Ct. 173 (1990), United States v. Hoelscher, 914 F.2d 1527 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 971 (1991); United States v. Meggers, 912 F.2d 246 (8th Cir. 1990); United States v. Smith, 909 F.2d 1164 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 691 (1991), United States v. Smith, 893 F.2d 1573 (9th Cir. 1990); United States v. Mayes, 917 F.2d

agent or informant should be presumptively excluded unless the government produces the declarant, or unless the government demonstrates through a recording the non-suggestive nature of the questioning. This prophylactic device will also deter prosecutorial abuse and enhance the jury's ability to function. If the declarant is unavailable due to death, the prosecution should be given the benefit of the doubt in a border line case of suggestibility since the prosecution has been deprived of the opportunity of producing the declarant. The need for confrontation is waived if the defendant caused the death or disappearance of the declarant.[211]

4. Declarations Against Interest

Statements induced as a consequence of custodial interrogation are markedly like the statements that produced the original demands for confrontation.[212] The potential for prosecutorial overreaching in this situation mandates a *per se* rule of exclusion as has been adopted in some of the circuits.[213] Courts should look at the context of non-custodial statements to prosecutors to see whether they were spontaneous or the product of a premeditated prosecutorial approach. Statements that were elicited through a planned interview should be excluded. Interviews of this type are particularly dangerous because the prosecutorial agent may be well aware that the declarant will never testify because he is involved in the criminal activities being investigated, and will claim the privilege against self-incrimination regardless of whether or not he is ultimately indicted.[214]

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457 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1087 (1991); United States v. Smith, 918 F.2d 1501 (11th Cir. 1990), *cert. denied*, 112 S. Ct. 151 (1991); United States v. Smith, 918 F.2d 1551 (11th Cir. 1990); United States v. Jones, 913 F.2d 1552 (11th Cir. 1990); United States v. Byrom, 910 F.2d 725 (11th Cir. 1990); United States v. Vasquez, 903 F.2d 1400 (11th Cir. 1990); United States v. Khoury, 901 F.2d 948 (11th Cir.), *opinion modified on denial of reh'g*, 910 F.2d 713 (1990); United States v. Thomas, 896 F.2d 589 (D.C. Cir. 1990).

211. *See supra* note 137 and accompanying text.

212. Cobham's statements implicating Raleigh can be analyzed as declarations against interest. *See* FED. R. EVID. 804(b)(3).

213. *See, e.g.*, United States v. Sarmiento-Perez, 633 F.2d 1092, 1104 (5th Cir. 1980), *cert. denied*, 459 U.S. 834 (1982).

214. *See* United States v. Taggart, 944 F.2d 837, 839 (11th Cir. 1991) (admitting as declarations against penal interest statements obtained by Secret Service agent in what appears to be third interview of the day; since court held that the hearsay exception was firmly rooted, it found that confrontation was automatically satisfied).

5. Residual Hearsay Exception

a. *Grand Jury Testimony*

A growing number of circuits have been admitting grand jury testimony by a now-unavailable declarant pursuant to the residual hearsay exception.[215] This result is clearly incompatible with a prosecutorial restraint interpretation of the Confrontation Clause. These statements are elicited, and often prepared, by the prosecutor.[216] It is difficult to imagine why the statement of Cobham put before a grand jury would differ significantly in content from the accusation he made against Sir Walter Raleigh. The prosecutor has an incentive to lean on the prospective witness to shape the grand jury testimony in accordance with the prosecution's theory of the case in order to secure an indictment and to freeze the witness's story as much as possible. If the declarant does not appear at trial, the prosecutor's role as ghostwriter will not be easily discernible. In addition, allowing the grand jury testimony to be used at trial encourages prosecutors to overreach in another way:

> [A] rule allowing the government to replace the live testimony of key witnesses with prior grand jury or other extra-judicial statements creates a powerful incentive for prosecutors to acquiesce in, or even plan, the unavailability of witnesses in order to prevent live confrontation and cross-examination of witnesses in the courtroom. It is much easier to plan a trial and convince a jury of a contested set of facts if the jury hears only the direct testimony from one side.[217]

If the Sixth Amendment guarantee of a public trial before a jury is to be meaningful, then secretly prepared grand jury testimony must be excluded unless the defendant has made the

215. United States v. Garner, 574 F.2d 1141 (4th Cir.), *cert. denied*, 439 U.S. 936 (1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), *cert. denied*, 431 U.S. 914 (1977). *But see infra* note 217.

216. *See, e.g.* United States v. Guinan, 836 F.2d 350, 357-58 (7th Cir.) (grand jury testimony of estranged wife who had contacted IRS was admitted; IRS agent had written statement which wife read verbatim before grand jury), *cert. denied*, 108 S. Ct. 2871 (1988).

217. United States v. Gomez-Lemos, 939 F.2d 326, 333 (6th Cir. 1991). The *Gomez-Lemos* court held that the Confrontation Clause barred grand jury testimony because Idaho v. Wright, 110 S. Ct. 3139 (1990), means that courts may no longer look to corroborating evidence as to the truth of the statement to establish "particularized guarantees of trustworthiness." *Id.* at 332. Although he agreed with majority that Confrontation Clause should bar testimony, Judge Nelson, concurring, suggested that grand jury testimony in question might be sufficiently trustworthy to gain admission in light of other decisions in circuit. *Id.* at 335 (Nelson, J. concurring). He would support application for rehearing en banc. *Id.* at 336.

grand jury witness unavailable[218] or, perhaps, the witness unexpectedly dies. In the latter situation, the prosecution might not be required to bear the loss of evidence that cannot be replicated and which it obtained in the ordinary process of preparing a criminal case.

b. *Child's Statement*

The *Wright* case illustrates how an interviewer with an agenda can manipulate a child.[219] Even if the government subsequently produces the child as a witness, the jury may find it extremely difficult to ascertain whether the initial questioning of the child tainted her perception and memory. When the child is so young that it is unlikely that he or she will qualify as a witness, the interviewer knows that the statement elicited will most probably constitute the chief evidence against the accused.

In *Wright*, the Idaho Supreme Court specifically noted that Dr. Jambura failed to record the interview on videotape, but the majority opinion in the United States Supreme Court rejected "the apparently dispositive weight placed by the Idaho court on the lack of procedural safeguards at the interview."[220] It explained that "[o]ut-of-court statements made by children

218. Even circuits that are unwilling to admit grand jury testimony under the residual exception will admit the testimony on a waiver theory when the defendant has caused the declarant's death. Under these circumstances, the courts have found a waiver of the right to confrontation as well. *See, e.g.*, United States v. Mastrangelo, 693 F.2d 269, 273 (2d Cir. 1982) (defendant's complicity must be shown by preponderance of evidence), *cert. denied*, 467 U.S. 1204 (1984); United States v. Thevis, 665 F.2d 616, 632 (5th Cir.) (clear and convincing standard used for determining whether defendant caused unavailability), *cert. denied*, 459 U.S. 825 (1982). This result accords with the Supreme Court's approach to waiver. *See supra* note 137 and accompanying text.

219. Other examples of children being manipulated by their interviewers abound. *See, e.g.*, Douglas Besherov, *Protecting the Innocent*, NATIONAL REVIEW, Feb. 19, 1990, at 44 ("As the McMartin case demonstrates, for young children, the basic issue is whether an interviewer has used leading or suggestive techniques to implant a distorted or untrue version of such abuse in a child's mind."); Dorthy Rabinowitz, *From the Mouths of Babes to a Jail Cell*, HARPERS, May 1990, at 52, 61 ("Perhaps the most important witness for the prosecution [in the Michael's case] was not a child or a parent but Bronx psychologist Eileen Tracy . . . [concerning whom a New Jersey trial judge had previously remarked] 'Ms. Tracy's questioning gently but surely led [the child] where Ms. Tracy wanted to take him.' The judge was convinced . . . that Tracy would have been able to elicit the same accusations from children who had not been abused."); *see also*, Debra C. Moss, *Are the Children Lying?* 73 A.B.A. J. 58 (1987).

220. Idaho v. Wright, 110 S. Ct. at 3148.

regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial."[221] Although a requirement of videotaping all statements by children might lead to the loss of valuable, spontaneous outbursts to persons such as neighbors and teachers,[222] premeditated prosecutorial questioning should be put into a different category. When the police send a child for an interview with a person whom officers selected and informed about the identity of the alleged perpetrator, special safeguards are needed to ensure that the child is not led to make the accusation desired by the authorities hiring the interviewer.[223]

In such cases, a record of the agent's questions is needed as a constraint on prosecutorial power. The vulnerability of the witness, the high potential for the witness's absence at trial, and the pressures on the prosecutor to get a conviction are factors that mandate an extraordinary safeguard. Especially in cases in which the community has succumbed to hysteria, the jury needs to know the extent to which the prosecution has contributed to the furor by manipulating the children through the interview process.[224] A child's statement to a prosecutor or prosecutorial agent should not be admitted regardless of whether it is reliable or the child is produced, unless a contemporaneous recording is available. At the very least, this requirement will ensure that the jury hears the child's version rather that the witness's paraphrase.[225] Such a requirement may also have a prophylactic effect in preventing some of the abuses that currently occur.

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221. *Id.*

222. *See, e.g.*, White v. Illinois, 112 S. Ct. 736 (1992).

223. For discussion of a child's susceptibility to suggestions by authority figure, see Mary Ann King & John Yuille, *Suggestibility and the Child Witness*, *in* CHILDREN'S EYEWITNESS MEMORY 24-25 (S. Ceci, et al. eds., 1987).

224. *See supra* notes 31-36.

225. In *Wright*, the witness summarized his conclusion about the child's response without making any effort to recall her actual words. For example, the witness testified as follows about the child's supposed statement that most directly implicated her father in sexually abusing her:

"Q. And then what did you say and her response?"

"A. When I asked her 'Does daddy touch you with his pee-pee' she did admit to that."

110 S. Ct. at 3148. A prosecutorial restraint model would protect the defendant against the creations of a witness.

CONCLUSION

If the Confrontation Clause is to play any part in protecting the public against the government—a goal that makes sense on both historical and contemporary grounds—then the right to confrontation must be viewed as more than an alternative statement of an evidentiary rule. In deciding the admissibility of hearsay statements, courts should pay attention to the government's role in creating those statements. Curtailing confrontation upsets the grand scheme of the Sixth Amendment because it prevents the prosecution's effect on evidence from being fully explored by a jury at a public trial.

Diminution of the right to confrontation is inconsistent with the aims of the Bill of Rights. The failure to hold statements elicited by the prosecution to a higher standard of admissibility defeats the objective of protecting the individual against the power of the government and interferes with the jury's historical function of guarding our civil liberties.